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# Report of the Working Group on Transport Law on the work of its ninth session (New York, 15-26 April 2002)

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## Introduction

1. At its twenty-ninth session, in 1996,[1] the Commission considered a proposal to include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving greater uniformity of laws.[2]

2. At that session, the Commission had been informed that existing national laws and international conventions had left significant gaps regarding various issues. These gaps constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particular to the use of new technologies.[3]

3. At that session, the Commission also decided that the Secretariat should gather information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems, so as to be able to present at a later stage a report to the Commission. It was agreed that such information-gathering should be broadly based and should include, in addition to Governments, the international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the *Comité maritime international* (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbors.[4]

4. At its thirty-first session, in 1998, the Commission heard a statement on behalf of CMI to the effect that it welcomed the invitation to cooperate with the Secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information.

5. At the thirty-second session of the Commission, in 1999, it was reported on behalf of CMI that a CMI working group had been instructed to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas where unification or harmonization was needed by the industries involved.[5]

6. At that session, it was also reported that the CMI working group had sent a questionnaire to all CMI member organizations covering a large number of legal systems. The intention of CMI was, once the replies to the questionnaire had been received, to create an international subcommittee to analyse the data and find a basis for further work towards harmonizing the law in the area of international

[1] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17).
[2] Ibid., para. 210.
[3] Ibid., para. 211.
[4] Ibid., para. 215.
[5] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 413.

transport of goods. The Commission had been assured that CMI would provide it with assistance in preparing a universally acceptable harmonizing instrument.[6]

7. At its thirty-third session, in 2000, the Commission had before it a report of the Secretary-General on possible future work in transport law (A/CN.9/476), which described the progress of the work carried out by CMI in cooperation with the Secretariat. It also heard an oral report on behalf of CMI. In cooperation with the Secretariat, the CMI working group had launched an investigation based on a questionnaire covering different legal systems addressed to the CMI member organizations. It was also noted that, at the same time, a number of round-table meetings had been held in order to discuss features of the future work with international organizations representing various industries. Those meetings showed the continued support for and interest of the industry in the project.

8. In conjunction with the thirty-third session of the Commission in 2000, a transport law colloquium, organized jointly by the Secretariat and CMI, was held in New York on 6 July 2000. The purpose of the colloquium was to gather ideas and expert opinions on problems that arose in the international carriage of goods, in particular the carriage of goods by sea, identifying issues in transport law on which the Commission might wish to consider undertaking future work and, to the extent possible, suggesting possible solutions.

9. On the occasion of that colloquium, a majority of speakers acknowledged that existing national laws and international conventions left significant gaps regarding issues such as the functioning of a bill of lading and a seaway bill, the relationship of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provide financing to a party to a contract of carriage. There was general consensus that, with the changes wrought by the development of multimodalism and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts, whether applying to one or more modes of transport and whether the contract was made electronically or in writing. Some issues raised for consideration in any reform process included formulating more exact definitions of the roles, responsibilities, duties and rights of all parties involved and clearer definitions of when delivery was assumed to occur; rules for dealing with cases where it was not clear at which leg of the carriage cargo had been lost or damaged; identifying the terms or liability regime that should apply as well as the financial limits of liability; and the inclusion of provisions designed to prevent the fraudulent use of bills of lading.

10. At its thirty-fourth session, in 2001, the Commission had before it a report of the Secretary-General (A/CN.9/497) that had been prepared pursuant to the request by the Commission.[7]

11. That report summarized the considerations and suggestions that had resulted so far from the discussions in the CMI International Subcommittee. The details of possible legislative solutions were not presented because they were currently being worked on by the Subcommittee. The purpose of the report was to enable the Commission to assess the thrust and scope of possible solutions and decide how it

[6] Ibid., para. 415.

[7] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/56/17), paras. 319-345.

wished to proceed. The issues described in the report that would have to be dealt with in the future instrument included the following: the scope of application of the instrument, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, the obligations of the shipper, transport documents, freight, delivery to the consignee, right of control of parties interested in the cargo during carriage, transfer of rights in goods, the party that had the right to bring an action against the carrier and time bar for actions against the carrier.

12. The report suggested that consultations conducted by the Secretariat pursuant to the mandate it received from the Commission in 1996 indicated that work could usefully commence towards an international instrument, possibly having the nature of an international treaty, that would modernize the law of carriage, take into account the latest developments in technology, including electronic commerce, and eliminate legal difficulties in the international transport of goods by sea that were identified by the Commission. Considerations of possible legislative solutions by CMI were making good progress and it was expected that a preliminary text containing drafts of possible solutions for a future legislative instrument, with alternatives and comments, would be prepared by December 2001.

13. After discussion, the Commission decided to establish a working group (to be named "Working Group on Transport Law") to consider the project. It was expected that the Secretariat would prepare for the Working Group a preliminary working document containing drafts of possible solutions for a future legislative instrument, with alternatives and comments, which was under preparation by CMI.

14. As to the scope of the work, the Commission, after some discussion, decided that the working document to be presented to the Working Group should include issues of liability. The Commission also decided that the considerations in the Working Group should initially cover port-to-port transport operations; however, the Working Group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations, and, depending on the results of those studies, recommend to the Commission an appropriate extension of the Working Group's mandate. It was stated that solutions embraced in the United Nations Convention on the Liability of Transport Terminals in International Trade (Vienna, 1991) should also be carefully taken into account. It was also agreed that the work would be carried out in close cooperation with interested intergovernmental organizations involved in work on transport law (such as the United Nations Conference on Trade and Development (UNCTAD), the Economic Commission for Europe (ECE) and other regional commissions of the United Nations, and the Organization of American States (OAS)), as well as international non-governmental organizations.

15. Working Group III on Transport Law, which was composed of all States members of the Commission, held its ninth session in New York from 15 to 26 April 2002. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Burkina Faso, Canada, China, Colombia, Fiji, France, Germany, Honduras, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Paraguay, Russian Federation, Singapore, Spain, Sweden, Thailand, United Kingdom of Great Britain and Northern Ireland, and the United States of America.

16. The session was also attended by observers from the following States: Angola, Australia, Belarus, Chile, Côte d'Ivoire, Cyprus, Denmark, Ecuador, Finland, Jordan, Netherlands, Peru, Philippines, Republic of Korea, Senegal, Switzerland, Tunisia and Venezuela.

17. The session was also attended by observers from the following international organizations:

(a) **United Nations system**: the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Economic Commission for Europe (ECE);

(b) **Intergovernmental organizations**: Comunidad Andina;

(c) **International non-governmental organizations invited by the Commission**: *Comité maritime international* (CMI), Instituto Iberoamericano de Derecho Marítimo, International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of P & I Clubs, International Multimodal Transport Association (IMTA), International Union of Marine Insurance (IUMI), Transportation Intermediaries Association, *Union internationale des avocats* (UIA) and the World Association of Former United Nations Interns and Fellows, Inc.

18. The Working Group elected the following officers:

*Chairman*: Mr. Rafael Illescas (Spain)

*Rapporteur*: Mr. Walter De Sá Leitão (Brazil)

19. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.III/WP.20);

(b) Preliminary draft instrument on the carriage of goods by sea: Note by the Secretariat (A/CN.9/WG.III/WP.21);

(c) Preliminary draft instrument on the carriage of goods by sea: Note by the Secretariat (A/CN.9/WG.III/WP.21/Add.1).

20. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft instrument on the carriage of goods by sea.
4. Other business.
5. Adoption of the report.

# I. Deliberations and decisions

21. The Working Group undertook a preliminary review of the provisions of the draft instrument contained in the annex to the note by the Secretariat (A/CN.9/WG.III/WP.21). In so doing, the Working Group took into account the comments presented by ECE and UNCTAD and reproduced in the annex to the note

by the Secretariat (A/CN.9/WG.III/WP.21/Add.1). The Working Group brought to the attention of the Commission that it had proceeded on the provisional working assumption that the scope of the draft instrument would cover door-to-door transport operations (see below, para. 32). The Commission was invited to review that working assumption. Due to the absence of sufficient time, the Working Group did not complete its consideration of the draft instrument, which was left for finalization at its tenth session, scheduled to be held from 16 to 20 September 2002 in Vienna, subject to approval by the Commission. The Secretariat was requested to prepare revised provisions of the draft instrument based on the deliberations and decisions of the Working Group. The deliberations and conclusions of the Working Group are reflected in section II below.

# II. Preparation of a draft instrument on transport law

## A. Preliminary considerations

22. The Working Group commenced its deliberations with respect to the preparation of a draft instrument on transport law (hereinafter referred to as "the draft instrument"). There was general consensus that the purpose of its work was to end the multiplicity of the regimes of liability applying to carriage of goods by sea and also to adjust maritime transport law to better meet the needs and realities of international maritime transport practices. The Working Group gratefully acknowledged the work already undertaken by the *Comité maritime international* (CMI) in preparing the draft instrument and the commentary relating thereto. The view was expressed that the draft instrument should take into consideration international conventions currently in force that govern different modes of transport, and that the draft instrument should seek to establish a balance between the interests of shippers and those of carriers.

23. The Working Group decided to commence its work by a broad exchange of views regarding the general policy reflected in the draft instrument, rather than focusing initially on an article-by-article analysis of the draft instrument. To assist in structuring the general discussion, it was agreed that seven themes should be examined, with reference being made in each case to the relevant provisions in the draft instrument. These were: sphere of application (draft article 3); electronic communication (draft articles 2, 8 and 12); liability of the carrier (draft articles 4, 5 and 6); rights and obligations of parties to the contract of carriage (draft articles 7, 9 and 10); right of control (draft article 11); transfer of contractual rights (draft article 12) and judicial exercise of those rights emanating from the contract (draft articles 13 and 14). Upon the suggestion made by one delegation, the Working Group agreed that a further theme should be added regarding the freedom of contract (currently dealt with in draft article 17) for examination as part of the thematic analysis of the draft instrument.

24. It was generally felt at the outset that any new instrument should be drafted bearing in mind possible interactions between the new regime and other transport law conventions that might be applicable. It was also agreed that in preparing any new instrument governing aspects of maritime transport, the need to ensure safety and security should be a paramount consideration. A suggestion was made that the

preparation of the draft instrument would be greatly assisted by the production of a table comparing the provisions of the draft instrument with other maritime texts such as the United Nations Convention on the Carriage of Goods by Sea, 1978 (also referred to in this report as "the Hamburg Rules"), the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1924, also referred to in this report as "the Hague Rules"), the Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1968, also referred to in this report as "the Hague-Visby Rules"), as well as other conventions selected among international instruments in force in the field of road, rail and air transport, such as the Convention on the Contract for the International Carriage of Goods by Road (Geneva, 1956, also referred to in this report as "CMR" or "the CMR"), the Convention concerning International Carriage by Rail (Berne, 1980, also referred to in this report as "COTIF" or "the COTIF"), the Convention for the Unification of certain Rules relating to International Carriage by Air (Warsaw, 1929, also referred to in this report as "the Warsaw Convention") and the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (Budapest, 2000, also referred to in this report as "CMNI"or "the CMNI"). That suggestion was adopted by the Working Group.

25. The Working Group noted with interest that UNCTAD was currently working on the preparation of a feasibility study on the establishment of a new multimodal transport convention, considering also its desirability, acceptability and practicability.

## B. General discussion

### 1. Sphere of application

#### (a) Possible application of the draft instrument to door-to-door transport

26. The Working Group devoted considerable attention to the issue whether the period of responsibility of the carrier as dealt with in the draft instrument was to be restricted to port-to-port transport operations or whether, should the contract of carriage include also land carriage before or after (or before and after) the sea carriage, the draft instrument should also cover the entirety of the contract (door-to-door concept). The discussion was initiated by suggestions that—since a great and increasing number of contracts of carriage by sea in particular in the liner trade of containerized cargo included land carriage before and after the sea leg—it was desirable to make provision in the draft instrument for the relationship between the draft instrument and conventions governing inland transport, which were applicable in some countries. Draft article 4.2.1 (Carriage preceding or subsequent to sea carriage) in document A/CN.9/WG.III/WP.21, which was placed between square brackets, indicated the approach that was suggested to be followed. The draft article provided for a network system, but one as minimal as possible. The draft instrument was only displaced where a convention that constituted mandatory law for inland carriage was applicable to the inland leg of a door-to-door carriage, and it was clear that the loss or damage in question occurred solely in the course of the inland carriage. This meant that, where the damage occurred during more than one leg of the door-to-door carriage or where it could not be ascertained where the loss or

damage occurred, the draft instrument would apply to the whole door-to-door transit period.

27. Suggestions were made that the draft instrument should be restricted to port-to-port transport operations. One reason given was that the extension of the proposed maritime regime to door-to-door operations required consultations with representatives of other modes of transport, which had not occurred during the preparatory work that had led to the production of document A/CN.9/WG.III/WP.21. However, in response it was pointed out that, while such consultations would take place and while the working methods of the Commission and the Working Group gave ample opportunity for such consultations, the proposed door-to-door approach took account of the legitimate interests of land carriers in that the mandatory liability regimes of the treaties were preserved by the draft instrument.

28. A further argument against the extension to door-to-door operations was that the earlier attempt at preparing a multimodal legislative convention, namely the United Nations Convention on International Multimodal Transport of Goods (Geneva 1980), was not successful and that including multimodal transport in the draft instrument might compromise the acceptability of the new instrument. It was also stated the UNCTAD/ICC Rules for Multimodal Transport Documents provided a contractual solution that worked in practice, which reduced the need for a legislative regime. Furthermore, UNCTAD was preparing a study on the feasibility of an international multimodal regime and it would be advisable to await the results of that study before taking a decision in the context of the draft instrument. However, it was stated in response that the door-to-door approach put forward for consideration was not aimed at constituting a fully-fledged multimodal regime but rather a maritime regime that took into account the reality that the maritime carriage of goods was frequently preceded or followed by land carriage. The draft instrument reflected that reality and was limited to resolving conflicts with mandatory treaties on land carriage. It was also suggested that limiting the draft instrument only to the sea leg might be regarded as not sufficiently useful a contribution to the harmonization of transport law, and that the proposed door-to-door concept increased the attractiveness of the project.

29. It was also stated that extending the maritime regime to land carriage segments preceding or following the sea carriage might give rise to legal complexities in a situation where the regime of the carriage of goods by sea would govern one set of issues and the regime of the carriage of goods by land (to the extent it was mandatory) would govern other issues and that difficulties would arise in reconciling and interpreting such legal regimes. Moreover, the carriage of goods by land would be governed by different rules depending on whether or not the land carriage was part of the door-to-door transport operation involving a sea leg. In response it was argued that the minimal system along the lines of draft article 4.2.1 was workable, responded to the expectations of the parties and the draft article established a good starting point for the discussion during which the solutions could be further refined to avoid difficulties of interpretation. Moreover, in other modes of carriage, notably under the Warsaw Convention, the parties were free to deal contractually with the land carriage preceding or following the air carriage as permitted by the mandatory regime governing land carriage and that situation worked satisfactorily in practice.

30. Considerable support was expressed for the view that the legislative regime applicable to maritime export-import operations should not treat the maritime leg in isolation disregarding the broader door-to-door transport operation. The draft instrument should respond to the reality that, in particular, containerized traffic in the liner trade was usually structured as door-to-door operations and that, in the light of technological developments, including electronic commerce, and the improvement of logistical facilities, the frequency of such operations would certainly increase in the future. Non-vessel-operating carriers (NVOCs) were increasingly offering such door-to door services and transport documents were issued covering the door-to-door operations; it would thus be artificial to restrict the legislative treatment of the transport of containers to the port-to-port segment of carriage, because the containers were not checked at the beginning and the end of the sea leg but rather at the agreed point in the interior at the facilities of the customer. That reality was reflected in the definition of the "contract of carriage" in draft article 1, pursuant to which such a contract meant a contract under which the goods were carried "wholly or partly" by sea. The way in which the coverage of door-to-door operations was suggested to be approached was based on resolving conflicts between treaties and preventing the draft instrument from displacing mandatory provisions of conventions such as the CMR and the COTIF. While the concept as currently reflected in draft article 4.2.1 was in need of detailed consideration and refinement, the approach was widely supported because it responded to the expectations of the trading community. It was added that through the concept of "performing party" (draft art. 1.17), which was yet to be considered by the Working Group, for example a road carrier that physically transported the goods would become responsible to the cargo owner as a performing party and the draft instrument would have to resolve a conflict between the regime of the draft instrument and the mandatory regime governing the road carriage.

31. It was noted that land carriage could be subject not to a mandatory regime of an international treaty but to a non-unified national regime (either because the State in question was not party to a treaty or because the land carriage was not international and did not meet the conditions for the applicability of the treaty). While the current version of draft article 4.2.1 subparagraph (b) envisaged that the draft instrument would yield only to mandatory provisions of an international convention, it was said that it might be useful to consider the relationship between the draft instrument and provisions of a non-unified national law relating to inland carriage (alluded to in the last sentence of paragraph 50 of A/CN.9/WG.III/WP.21).

32. In discussing the issue the Working Group was conscious of the mandate given to it by the Commission (A/56/17, para. 345), in particular of the fact that the Commission had decided that the considerations in the Working Group should initially cover port-to-port transport operations, but that the Working Group would be free to consider the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations, and depending on the results of those considerations recommend to the Commission an appropriate extension of the Working Group's mandate. Bearing that in mind, the Working Group adopted the view that it would be desirable to include within the scope of the Working Group's discussions also door-to-door operations and to deal with these operations by developing a regime that resolved any conflict between the draft instrument and provisions governing land carriage in cases where sea carriage was complemented by one or more land carriage segments. Consequently, the Working

Group requested the Commission to approve the approach suggested by the Working Group. The Working Group considered that it would be useful for it to continue its discussions of the draft instrument under the provisional working assumption that it would cover door-to-door transport operations.

**(b) Internationality of the carriage**

33. The Working Group discussed the implications of the approach to internationality taken in draft article 3. In particular, a question was raised as to whether the provisions establishing the sphere of application of the draft instrument should result in different solutions regarding the applicability of the draft instrument according to whether or not the transport segments preceding and following the maritime segment involved an element of internationality. It was generally considered that the draft instrument should apply as soon as an element of internationality characterized the overall contract of carriage, irrespective of whether or not certain segments of the carriage were purely domestic. To illustrate that point, it was stated that the draft instrument should apply to a transport initiating in Madrid and ending in Philadelphia, where the goods were carried by road from Madrid to Cádiz, by sea from Cádiz to New York, and by road from New York to Philadelphia. The draft instrument should apply equally to a transport between Berlin and Buffalo, where the goods were carried from Berlin to Rotterdam by train, then from Rotterdam to Montreal by sea, then from Montreal to Buffalo by road. In the context of that discussion, it was pointed out that, in preparing the draft instrument, particular attention would need to be given to the need for a clear solution regarding possible conflicts between the different legal regimes (whether of international or domestic origin) that might govern the different segments of the transport depending on the mode of transport being used. For example, to deal with the above-mentioned transport between Berlin and Buffalo, preference was generally expressed for the simpler, more broadly encompassing solution under which the draft instrument would govern the entire transport, irrespective of the fact that domestic segments were included. It was observed, however, that such a simple solution would differ from the more complex and more restrictive solution adopted in a recent revision of the COTIF, under which transport segments ancillary to the rail segment would be covered by the COTIF only where they were purely domestic.

34. With respect to the various factors listed in subparagraphs (a) to (e) of draft article 3.1 for determining the internationality of the carriage, support was generally expressed to adopting the broadest possible sphere of application for the draft instrument. As a matter of drafting, it was pointed out that, consistent with the door-to-door approach favoured as a working assumption by the Working Group, the notions of "place of receipt" and "place of delivery" should be preferred to the notions of "port of loading" and "port of discharge". In that connection, it was observed that the port of loading and the port of discharge as well as any intermediary port would not necessarily be known to the shipper. With respect to the substance of the provision, doubts were expressed as to whether the place of conclusion of the contract mentioned in subparagraph (d) should be regarded as relevant for determining the application of the draft instrument. It was widely held that, in modern transport practice, the place of conclusion of the contract was mostly irrelevant to the performance of the contract of carriage and, if electronic commerce was involved, that place might even be difficult or impossible to determine.

## 2. Electronic communications (draft articles 2, 8 and 12)

35. Considerable support was expressed in favour of the policy on which the treatment of electronic communications in draft articles 2, 8 and 12 was based. The attention of the Working Group was drawn to the need for reviewing the draft instrument with a view to ensuring consistency with the text of the UNCITRAL Model Law on Electronic Commerce, with respect to both substance and terminology.

36. The Working Group was generally in agreement with the establishment of a functional equivalence between existing transport documents such as negotiable or non-negotiable bills of lading and electronic communication systems put in place to replace such documents in an electronic environment. It was pointed out, however, that one purpose of the draft instrument was to establish stand-alone rules, on the basis of which the legal value of electronic communications exchanged as substitutes for paper-based documents would be directly recognized, without necessarily referring to the traditional concepts of paper-based transport documentation. In that respect, the draft instrument could be described as going beyond merely recognizing the functional equivalence between paper documents and their electronic counterparts. As an additional benefit expected from such an approach, the draft instrument would thus alleviate the inconvenience that might result from the current disparities between jurisdictions in the interpretation of a notion such as "bill of lading", which could cover negotiable and non-negotiable documents.

37. As to the contents of the specific rules embodied in draft article 2, various suggestions were made. One suggestion was that a mechanism should be provided to identify with sufficient clarity the originator of the electronic record or records that would be used as a substitute for a bill of lading. Another suggestion was that the draft instrument should establish requirements for the storage of electronic records in a manner that would preserve the integrity of their contents. More generally, it was suggested that the draft instrument should address the means through which the transferability function associated with negotiable bills of lading could be replicated in an electronic environment. It was stated that a mere reference to "adequate provisions" in the agreements to be concluded between the parties would not be sufficient to address the issue of negotiability, which might also need to be considered in factual situations where no prior agreement had been made between the parties with respect to electronic communications. In that connection, the view was expressed that the draft instrument should require agreements to use electronic communications to be made expressly by the parties. Yet another suggestion was that the draft instrument should provide rules to solve possible conflicts that might arise between the paper and the electronic version of transport documents issued for the purposes of the same contract of carriage, in particular if not all the originals of a paper bill of lading were surrendered prior to the issuance of an electronic version.

38. The Working Group took note of those various suggestions for continuation of the discussion regarding electronic communications at a later stage on the basis of the provisions contained in draft articles 2, 8 and 12.

### 3. Liability (draft articles 4, 5 and 6)

#### (a) Liability of the carrier and period of responsibility

39. In keeping with its decision to restrict its consideration to a general examination of themes, the Working Group undertook a preliminary analysis of the general approaches taken in draft articles 4, 5 and 6. It was generally agreed that the provisions as drafted were an essential component of the draft instrument and represented a basis upon which to found any discussion of the applicable regime for the obligations and liabilities of the carrier. It was pointed out that the provisions as drafted sought to maintain a number of important features that existed in international conventions and national laws currently in force. It was also generally agreed that draft articles 4, 5 and 6 should be read together, particularly since the extent of the obligations and liabilities of the carrier dealt with in draft articles 5 and 6 respectively, depended on the time at which the period of responsibility of the carrier commenced and ended as set out in draft article 4. A view was expressed that draft articles 4, 5 and 6 tended to reduce the liability of the carrier compared to articles 4 and 5 of the Hamburg Rules. Under that view, it was suggested that, at least for use in those countries that had ratified the Hamburg Rules, the provisions of draft articles 4, 5 and 6 of the draft instrument might need to be reviewed to be brought in line with articles 4 and 5 of the Hamburg Rules.

40. Referring to the policy underlying draft article 4.1.1, it was observed that the draft provision seemed to be based on the principle that the carrier's liability was linked to a concept of custody by the carrier of the goods (which was initiated by the receipt of goods and ended by their delivery). A widely shared view was that, in any case, the concept of custody had prevailed in international instruments relating to other modes of transport and the same should occur in the context of the draft instrument. In that connection, some reservations were expressed with the approach taken in draft articles 4.1.2 and 4.1.3 according to which the precise moment of the receipt and delivery of goods was a matter of contractual arrangements between the parties or a matter to be decided upon by reference to customs or usages. The view was expressed that such contractual flexibility was in contradiction with modern transport conventions such as the COTIF and the CMNI, that it introduced an element of uncertainty in the mandatory liability regime of the draft instrument, and that it might even open some possibility of manipulation of the moment when the liability began and ended. It was argued that such a concept of contractual flexibility might undermine the aim of having the draft instrument cover door-to-door transport. However, support was expressed for opinions that the time and location of the delivery of the goods should be left to the carrier and the shipper (both of whom were commercial parties capable of assessing the risks and implications of their agreement on the matter). Such freedom of contract was necessary to reflect the fact that the moment when the custody of the goods began and ended depended on circumstances such as practices prevailing in different ports, characteristics of the vessel and the goods, the loading equipment and similar elements. It was said that there was nothing wrong with leaving the parties free to agree when the custody of the goods should begin and end, as long as the effective custody of the goods by the carrier and its liability for them were coextensive. It was noted that, also under article 4 (1) and (2) of the Hamburg Rules (under which the liability began when the goods were taken over at the port of loading and ended when they were delivered at the port of discharge), it was implicit that the carrier

and the shipper had a degree of latitude in agreeing whether the taking over and delivery occurred, for instance, under the tackle of the ship or at some other point in the port. It was observed that the rules on liability should be analysed with respect to both the port-to-port option and the door-to-door option. In relation to draft article 4.2.1, some delegations expressed the view that they could not approve of extending the maritime regime to the pre- and post-sea carriage in the way it was proposed in the draft article. It was stated that there were also other options regarding the elements of a network system. The regime applicable to non-localized damages should be analysed in view of applicable regimes covering land transport.

**(b) Mixed contracts of carriage and forwarding**

41. Views were expressed regarding the possibility that the carrier and the shipper might expressly agree that the carrier, upon performing its contract obligations, would, as an agent, arrange for a connecting carriage (a possibility that was expressly addressed in draft article 4.3). Misgivings were expressed about that possibility as it was considered that it opened a way to subcontracting for a part of the carriage and excluding liability for that subsequent carriage by stipulating that the carrier arranged for it as an agent. While sympathy was expressed for that view (in particular where standard printed contract conditions were used to shorten the period of liability without taking into account the concrete context in which the carrier's liability was to end and the carrier assumed the role of an agent), views were expressed that it was not reasonable for legislation to attempt to prevent parties from agreeing that one of the parties would act as an agent for the other if that was a considered and joint decision by the parties.

42. It was also observed that other transport conventions did not provide for a possibility of the carrier acting as an agent (or quasi freight forwarder) for the cargo owner, and that the draft instrument should not allow for such a possibility. However, in response it was noted that even if that possibility was not envisaged in the legislation, it was not excluded that the parties could agree to it, and that, in order to protect the interests of the parties, it was useful to clarify the practice and establish conditions designed to prevent abuse.

**(c) Obligations of the carrier**

43. In respect of draft article 5.4, strong support was expressed for imposing upon the carrier an obligation of due diligence that was continuous throughout the voyage by retaining the words that were currently in square brackets "and during" and "and keep". Among views that were expressed in favour of imposing such an obligation, it was pointed out that, with improved communication and tracking systems allowing a carrier to closely follow the voyage of a vessel, a continuing obligation of due diligence was appropriately adapted to modern business practices. However, it was suggested that the degree of diligence would or should depend on the context, to the effect that, for example, the duty of the carrier would be different depending on whether the vessel was at sea or in port. In addition, it was suggested that the content of such a duty of due diligence should be drafted so that account could be taken of evolving standards such as the International Management Code for the Safe Operation of Ships and for Pollution Prevention (1993, "the ISM Code") and evolving international standards that might be developed, in particular, by the

International Maritime Organization. Notwithstanding the broad support for a continuing obligation of due diligence, a concern was raised that the extension of the carrier's obligation to exercise due diligence in respect of the whole voyage put a greater burden on carriers and could lead to the associated costs being passed on in the form of higher freights. Also it was suggested that if door-to-door coverage was ultimately accepted, the inclusion of draft article 5.2.2 should be reviewed. It was recalled that draft article 5.2.2 was intended to make provision for FIO (free in and out) and FIOS (free in and out, stowed) clauses. Support was expressed for the inclusion of this draft article because it resolved current legal uncertainty as to whether the carrier under a FIO or FIOS clause only became liable once the cargo was loaded or stowed. Furthermore, it was said that, in view of the fact that, in some legal systems, adopting FIO(S) clauses meant that the mandatory harmonized regime governing the liability of the carrier did not apply, the benefit of dealing with FIO(S) clauses in the draft instrument was that it would put beyond doubt the principle that the carrier owed an obligation of due diligence even where the parties had agreed on such a clause. Some concern was expressed that, in allowing contracting out, draft articles 5.2.2 might undermine the principle of uniformity.

44. In respect of draft article 6.1.1 regarding the liability of the carrier, there was strong support for the view that the basis for liability should be the fault committed by the carrier rather than a strict liability. In respect of the exceptions to the liability as set out in article 6.1.2, it was noted that the exceptions to liability resulting from error in navigation or management of the ship (paragraph (a)) or from fire on the ship, unless caused by the fault or privity of the carrier (paragraph (b)) expressly created grounds for exoneration of the carrier by way of a deeming provision. A strong argument was made that, given that a central aim of the draft instrument was modernisation, the exemption from liability for errors in navigation or management in the ship was out of date, particularly in light of other conventions dealing with other modes of carriage, which did not include such an exemption. However, in opposition to the suggested deletion of draft article 6.1.2, a view was that marine transport did raise unique concerns and that deletion of such an existing cause of exemption might have economic impact on the parties. An argument for retention of the defence was made on the basis that it was not appropriate to compare sea with road, rail and air transport, notwithstanding technological advancements on vessel security and monitoring of vessels at sea. In respect of the exception relating to fire, some support was expressed for its retention, possibly in a form more closely based on the approach taken in the Hague-Visby Rules, namely that the fire be on the vessel unless caused by the actual fault or actual privity of the carrier. It was observed, however, that the circumstances where fire should be considered as a cause for exoneration of the carrier, i.e., where it was the result of an action of the shipper or an inherent defect of the goods, was sufficiently covered under draft article 6.1.3 (iii) and (vi).

45. With respect to the relative exceptions to the liability of the carrier listed in draft article 6.1.3, the Working Group noted that the draft provision was based on the Hague Rules. There was no consensus on whether the exceptions should be treated as exonerations from liability or whether they should be presumptions only. Nor was a consensus achieved as to the specific elements of the list. Doubts were expressed, in particular, with respect to the acceptability of the new exceptions contained in subparagraphs (ix) and (x) of the draft provision, which might need to be further considered in light of the decisions to be made with respect to the

possibility to determine by contract the beginning or the end of the period of responsibility of the carrier. It was agreed that the draft provision would need to be discussed extensively at a later stage.

46. With respect to draft article 6.1.4, some preference was expressed in favour of the second alternative wording, which was said to be more reflective of a balanced approach to the obligations of the carrier and the shipper.

47. The Working Group decided that the general discussion of the issues of liability should be reopened at a future session on the basis of draft articles 4, 5 and 6 after more extensive consultations had taken place.

## 4. Rights and obligations of the parties to the contract of carriage (draft articles 7, 9 and 10)

### (a) Obligations of the shipper (draft articles 7 and 10)

48. The Working Group proceeded to consider draft articles 7 and 10 dealing with obligations of the shipper and delivery to the consignee. It was observed that the prime obligation of the shipper was to pay freight with secondary obligations being to bring the cargo into the custody of the carrier and provide the carrier with goods in such a condition that they would withstand the intended carriage. The Working Group recognized that these obligations were reflected in many national laws and in business practices. It was further observed that the shipper was obliged to inform the carrier of the nature of the cargo, and in particular whether the cargo was dangerous.

49. It was pointed out that draft articles 7 and 10 had been drafted with the aim of providing balanced rights and obligations as between the shipper and the carrier, which improved on the approach taken in the Hague-Visby Rules and expanded in scope upon the approach taken in Hamburg Rules. It was observed that the draft text of article 7.5 imposed strict liability for failure on the part of the shipper to enable the carrier to carry the goods safely. There was general agreement that draft article 7 provided a basis for further debate. A suggestion was made that the shipper's obligation to deliver the goods ready for carriage should not be left entirely to the will of the parties as set out in draft article 7.1, particularly in view of the obligation of the carrier to provide information under draft article 7.2. It was stated that such an obligation was directly related to the safety and security of the vessel and thus should not be left entirely to party autonomy. A suggestion was made that in certain circumstances, for example where goods carried could be hazardous to the environment or a risk to third parties, the carrier or master of the vessel should be allowed to provide information on the goods to relevant bodies such as a port authority. It was questioned whether draft article 7.2, which dealt with an obligation of the carrier, was correctly located in chapter 7, given that this chapter dealt with obligations of the shipper.

50. The view was expressed that, as currently drafted, the obligations placed on the shipper might not be in total balance with those imposed upon the carrier. For example, draft article 7.6 only allowed a shipper to escape liability if it could show that the loss, damage or injury caused by the goods was caused by events that a diligent shipper could not avoid or the consequences of which a diligent shipper would be unable to prevent. By contrast, the corresponding liability provision in respect of the carrier set out in draft article 6.1.1 allowed the carrier to escape liability if it could show there had been no fault on its part. It was agreed that, whilst

the obligations of the shipper and carrier should be properly balanced, this balance should be assessed from a global perspective rather than by an article-by-article or obligation-by-obligation analysis. In that regard, it was noted that the carrier had the benefit of defenses and limitations that were not available to the shipper.

51. The Working Group generally agreed that draft articles 7 and 10 provided a good basis for further discussion of the obligations of the shipper and were particularly important from the point of view of protecting the safety of vessels. However, it was noted that there was no distinction between ordinary and hazardous goods in the text, in contrast to some existing regimes regarding safety and security. In that respect, it was suggested that, notwithstanding that the current text had a different focus, the Working Group should further examine relevant conventions relating to safety of goods such as the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996. It was observed that in the context of draft article 7 it was not useful to make a distinction between dangerous and non-dangerous goods since goods that might generally be regarded as non-dangerous might, in concrete circumstances, cause damage to other goods.

**(b) Freight (draft article 9)**

52. It was observed that, based on international practices, draft article 9 dealt with a variety of issues, including time for the payment of freight, exceptions to the payment obligation, and the right of retention of the goods by the carrier until such payment had been received. A question was raised regarding the meaning of "other charges incidental to the carriage of goods", which were mentioned but not defined in draft article 9.3 (a). It was suggested that such a mention might make it necessary to specify in draft article 9.4 (a) that, where the transport document contained the statement "freight prepaid", no payment for either freight or other charges was due. The Working Group expressed general support in favour of the structure of draft article 9 and of the policy on which it was based. The discussion focused on whether and to what extent the provisions of draft article 9 should be open to variation by agreement of the parties and on the scope of the right of retention.

53. With respect to the mandatory or non-mandatory nature of the provisions, the view was expressed that, in view of their possible impact on third parties, certain provisions contained in draft article 9 should not be open to variation by contract. For example, draft article 9.2 (b) was said to be declaratory in nature and not subject to contrary agreement. The opposing view was that draft article 9 would serve a more useful function if it offered a set of default rules applicable only in the absence of any specific provision in the contract of carriage. It was stated that even draft article 9.2 (b) could lead to unjustified results if no exception to it could be envisaged in any circumstances. It was thus suggested that the entire text of draft article 9 should be made subject to contrary agreement. At the close of the discussion, it was generally felt that, in reviewing the individual provisions of draft article 9 at a future session, the Working Group would need to decide, in connection with each subparagraph, whether the provision should function as a default rule or not.

54. As to the right of retention, a question was raised as to whether draft article 9.5 limited the exercise of the right of retention to cases where the obligation to pay freight resulted from a corresponding obligation under applicable domestic

law. It was suggested that the scope of the right of retention should be clarified or extended to avoid the possibility of such a limitation. It was stated in response that the application of draft article 9.4 (b) and draft article 9.5 (a) was not intended to be contingent upon a notion of liability; the right of retention was intended to arise directly from the failure by the consignee to pay freight if the consignee had been put on notice that such freight was due. It was widely felt, however, that the draft provisions, in particular the reference to the consignee being "liable for the payment of freight" might need to be further discussed.

## 5. Right of control (draft article 11)

55. The draft provision regarding the right of control was generally considered a welcome addition to traditional maritime transport instruments. The Working Group did not engage in a detailed discussion of the provisions of draft article 11 but expressed its confidence that the draft article would constitute a good basis for continuation of the discussion at a future session.

56. Among preliminary observations that were made to the text of draft article 11, a concern was expressed regarding the excessive complexity of the provision, particularly if it were to apply to door-to-door transport. While it was generally expected that the provision could be clarified and simplified in both structure and contents at a further stage, it was pointed out that establishing basic rules on the right of control was essential in particular to the development of electronic communications. It was suggested that regulating the right of control should be consistent with the "right to dispose of the goods" or the right to modify the contract as regulated by other transport conventions such as the CMR. Concerns were expressed in relation to the provision of a possibility to make a variation of the contract including, for example, a change of the place of delivery. The view was expressed that this provision imposed a greater burden on the carrier than existed under current regimes, and that the right should be restricted to the holder of a transport document in the case of a negotiable transport document. It was stated that with regard to a non-negotiable document, the right should be confined to changing the name of the consignee as provided for under the CMI Uniform Rules for Sea Waybills. As to the operation of the provision, a question was raised regarding the meaning of the words "the controlling party shall indemnify the carrier" in draft article 11.3 (b). It was pointed out that the notion of indemnity inappropriately suggested that the controlling party might be exposed to liability. That notion should be replaced by that of "remuneration", which was more in line with the rightful exercise of its right of control by the controlling party. Another question was raised as to the possible consequences of failure by the carrier to comply with the new instructions received from the controlling party. It was suggested that, in the continuation of the discussion, the Working Group would need to decide whether such consequences should be regulated by the draft instrument or left to applicable domestic law.

## 6. Transfer of contractual rights (draft article 12)

57. The Working Group, which considered that a provision on the transfer of rights was useful in the context of the draft instrument, heard several observations relating to it. It was stated that draft article 12.1.1(iii) and 12.2.1 and 2 were difficult to interpret and were in need of clarification; as to the reference in draft article 12.3 to

"the national law applicable to the contract of carriage" it was said that it was either unnecessary and could be deleted or it raised questions of conflicts of laws to which no answers were provided. As to draft article 12.2.2, some support was expressed for it; however, it was also said that it might open the way for the carrier, by using standard clauses in the contract of carriage, to extend liabilities from the shipper to the holder of the transport document. It was said that the last two sentences of draft article 12.3 might interfere with national provisions on form of transfers of contractual rights and that deleting them might be considered.

## 7. Judicial exercise of rights emanating from the contract of carriage (draft articles 13 and 14) and jurisdiction

### (a) Right of suit and time for suit (draft articles 13 and 14)

58. It was suggested that in addition to dealing with the right of suit against the carrier (draft article 13.1) there should also be provisions on the carrier's right of suit (e.g. against the shipper when the shipper failed to perform one of its obligations). It was noted that the concept of subrogation differed among national laws, which introduced an element of uncertainty into the provision.

59. It was said that draft article 13.1 was not sufficiently clear as to which were the parties entitled to sue. The question was raised as to whether a party who did not suffer a loss should be able to sue (as indicated in draft article 13.2); however, views were expressed that it was useful to clarify in the draft instrument that the holder of a negotiable transport document had procedural standing to sue, whether on its own account or on behalf of the party who suffered the loss. It was considered that draft article 13.2 gave rise to questions that needed to be clarified; for example, it was said that, when the party who sued did so on behalf of the party who suffered loss, only one party and not both should be able to sue. It was also observed that, if the holder who itself has not suffered any loss or damage sued and lost the case, that outcome would have to be binding also for the party who suffered the loss or damage. Since the last sentence of draft article 13.2 touched upon issues of national law that were difficult to clarify in the context of the draft article, it was suggested that it might be preferable to delete it.

60. As to draft article 14, it was suggested to refer therein also to the performing carrier ("performing party") and the consignee. It was also suggested that in draft article 14.4 the 90-day period should be specified as a default rule that would apply unless the law of the State where the proceedings were instituted provided for a longer period. As to the one-year period indicated in draft article 14.1, several views were expressed that the period was adequate; legal certainty and ease of communications between the parties were mentioned as grounds for the acceptability of the time period; however, there were also views in favour of extending the time period to two years, which was the period specified in the Hamburg Rules. Another suggestion was made to provide for a two-to three-year period in case of wilful misconduct. The Working Group took no decision on the matter. As to draft article 14.2, a concern was expressed whether such a rule would be appropriate in a door-to-door transport, especially where the period of responsibility had been contractually restricted in accordance with draft articles 4.1.2 and 4.1.3.

**(b) Jurisdiction**

61. It was noted that the draft instrument did not deal with issues of jurisdiction (the reason being, as indicated in the note by the Secretariat (A/CN.9/WG.III/WP.21, Introduction, para. 24), that it seemed premature to formulate a provision on jurisdiction or arbitration at that early stage of the project before some substantive solutions were reached on substantive solutions). While some support was expressed for not including in the draft instrument such a provision on jurisdiction and arbitration, it was widely considered that such a provision would be useful and even, in the view of some, indispensable. While no conclusions were reached as regards the substance of such a provision, several suggestions were made as to its possible content: that the State of delivery of the goods should be one of those which would have jurisdiction; that arbitration should be addressed in the future provision; that the provisions should override a jurisdiction clause in the transport contract (except where the clause was agreed upon after the loss or damage has occurred); that parties by express agreement might be able to decide upon a jurisdiction of their choice; and that articles 21 and 22 of the Hamburg Rules were to serve as a model for the draft provision.

**8. Freedom of contract (draft article 17)**

62. It was observed that the resolution of the issues identified in the commentary to draft articles 3.3 and 3.4 (in respect of exclusion of charter parties, contracts of affreightment, volume contracts and similar agreements) would impact on the practical effect of draft article 17 which set out the limits of contractual freedom. Several different positions were taken on the question whether charterparties and similar agreements should be covered by the draft instrument. A strong view taken in the Working Group was that the exclusion of charterparties was appropriate as it reflected the traditional approach. It was noted however that draft article 3.3 went beyond the traditional approach in attempting to exclude also contracts of affreightment and similar agreements. It was suggested that it would be appropriate for sophisticated parties to have freedom of contract to agree to the terms that might apply and, in particular, on the liability provisions that would apply as between themselves. It was thus suggested that the best approach would be that the draft instrument would not apply in principle to charterparties but that parties to such agreements would be free to agree to its application as between themselves. Such an agreement to submit a charterparty to the draft instrument would not bind third parties that did not consent to be bound. Another suggestion was that the exclusion of charterparties from the scope of the draft instrument should be drafted so as not to discriminate between carriers. It was further suggested that the exclusion of charterparties should be drafted so as to make it clear that slot and space-charter agreements were also excluded. After discussion, there was general agreement that charterparties and similar type agreements such as slot-charter agreements and space-charter agreements should be excluded from the scope of the draft instrument.

63. The Working Group considered whether or not it was necessary to define expressly what was meant by the term "charterparty". In that respect, it was noted that a definition was very important given that the exclusion in draft article 3.3.1 referred to charterparties "or similar agreements". It was said that without defining a charterparty it would be difficult to know what was meant by such "similar agreements". Against the inclusion of a definition of charterparty it was noted that

the term had not been defined in either the Hague, Hague-Visby or Hamburg Rules and that this had not caused any significant difficulties in practice. However, it was said that given the broader coverage of the draft instrument, a definition was needed. Following discussion, views were expressed in favour of the inclusion of a definition of charterparty for the sake of clarity. In this respect it was noted that the proposed definitions set out in paragraphs 39 and 41 of A/CN.9/WG.III/WP.21 could provide a useful starting point.

64. In respect of 17.2 (a) which allowed the carrier and the performing party to exclude or limit liability for loss or damage to goods where the goods were live animals, there was wide support that this provision was appropriate. In support of the provision, it was argued that this was a traditional exception, with both the Hague and Hague-Visby Rules excluding live animals from the definition of goods. It was noted that trade in live animals represented only a very small trade. However, a concern was raised against allowing the carrier to exclude or limit the liability for loss or damage to live animals. It was suggested that a better approach would be to simply exclude carriage of live animals altogether from the draft instrument rather than allowing exclusion of liability. Overall, bearing these concerns in mind, the Working Group generally agreed that the carriage of live animals should be exempt from the coverage of the draft instrument.

65. After considering the exclusion of charter parties form the scope of application of the draft instrument, the Working Group considered in a preliminary fashion the phenomenon of individually negotiated transport agreements as opposed to transport contracts concluded on standard terms. It was stated that the practice of individualized transport agreements (in practice referred to by expressions such as volume contracts or transport service contracts) had developed in different industries that shipped goods internationally and with shippers of different sizes. Such contracts typically resulted from careful negotiations which addressed matters such as the volume of goods to be transported (expressed in absolute or relative terms), the period over which the goods would be transported, various service terms, price, as well as liability issues. Such individually negotiated contracts varied in their focus, for example, in that some specifically dealt with liability issues while others did not pretend to modify the generally applicable liability regime.

66. It was suggested that such contractual arrangements should be considered by the Working Group with a view to giving them a treatment that was different from other transport contracts. Such contracts would include the following special features: they would be covered by the draft instrument but its provisions would not be mandatory with respect to them; the draft instrument, including the liability provisions would apply fully except to the extent the parties specifically agreed otherwise; derogations from the otherwise mandatory regime would have to be individually negotiated and could not be established by standard terms; third parties, including the consignee (the holder of the bill of lading or the person entitled to take delivery of the goods on another basis) would be bound by such individually negotiated terms only if, and only to the extent that, they specifically agreed to them (for example, by becoming a party to the individually negotiated contract); such agreement by third persons would have to be specific and could not be expressed by standard terms; when such an individually negotiated contract was in the nature of a "framework contract" pursuant to which individual shipments were effected, the individual shipments would be subject to the terms of the framework contract, but if

a separate contract document (such as a bill of lading or a sea way bill) entitling a third person to take delivery of the goods were issued, the terms of the framework contract would not be binding on the third person, except if the third party specifically agreed.

67. Suggestions were made that contracts receiving special treatment in the draft instrument (whether they were to be excluded from the scope of application of the draft instrument, such as charter parties, or to be able to agree specifically to deviate from one or more of the mandatory provisions) should be defined in the draft instrument. Broad support was expressed for defining those contracts under which parties would have the flexibility to agree specifically to deviate from one or more of the mandatory provisions. The definition of such contracts contained in paragraph 42 of the note by the Secretariat (A/CN.9/WG.III/WP.21) was suggested as a basis for discussion. No firm view emerged as to the appropriateness of defining charter parties.

68. In some countries individually negotiated contracts (such as volume contracts or transport services contracts) were subject to regulatory regimes, which, for instance, required that these contracts be filed with the regulatory agency which had some supervisory prerogatives. While such regulatory regimes had features that were irrelevant for the current discussion, some of them might serve as an inspiration in finding an appropriate definition of such contracts for the draft instrument.

69. A concern was expressed that the so-called "individually negotiated contracts in liner trade" were difficult to define and could cover a broad range of contracts, which could open the door for widespread evasion of the draft instrument and thus dilute the strength of this new regime. It was further pointed out that a distinction should be made between those contracts and individual shipments made thereunder.

70. The Working Group took note of those views and proposals and, while not reaching any conclusions, agreed that it would be worthwhile to consider at a future session these individually negotiated contracts, their description or definition and their treatment in the draft instrument.

## C. Consideration of draft articles

### 1. Draft article 1 (Definitions)

71. The text of draft article 1 as considered by the Working Group was as follows:

"For the purposes of this instrument:

"1.1 'Carrier' means a person that enters into a contract of carriage with a shipper.

"1.2 'Consignee' means a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic record.

"1.3 'Consignor' means a person that delivers the goods to a carrier for carriage.

"1.4 'Container' includes any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

"1.5 'Contract of carriage' means a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea from one place to another.

"1.6 'Contract particulars' means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that appears in a transport document or an electronic record.

"1.7 'Controlling party' means the person that pursuant to article 11.2 is entitled to exercise the right of control.

"1.8 'Electronic communication' means communication by electronic, optical, or digital images or by similar means with the result that the information communicated is accessible so as to be usable for subsequent reference. Communication includes generation, storing, sending, and receiving.

"1.9 'Electronic record' means information in one or more messages issued by electronic communication pursuant to a contract of carriage by a carrier or a performing party that

"(a) evidences a carrier's or a performing party's receipt of goods under a contract of carriage, or

"(b) evidences or contains a contract of carriage,

"or both.

"It includes information attached or otherwise linked to the electronic record contemporaneously with or subsequent to its issue by the carrier or a performing party.

"1.10 'Freight' means the remuneration payable to a carrier for the carriage of goods under a contract of carriage.

"1.11 'Goods' means the wares, merchandise, and articles of every kind whatsoever that a carrier or a performing party received for carriage and includes the packing and any equipment and container not supplied by or on behalf of a carrier or a performing party.

"1.12 'Holder' means a person that

"(a) is for the time being in possession of a negotiable transport document or has the exclusive [access to] [control of] a negotiable electronic record, and

"(b) either:

(i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to whom the document is duly endorsed, or

(ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof, or

(iii) if a negotiable electronic record is used, is pursuant to article 2.4 able to demonstrate that it has [access to] [control of] such record.

"1.13 'Negotiable electronic record' means an electronic record

(i) that indicates, by statements such as 'to order', or 'negotiable', or other appropriate statements recognized as having the same effect by the law governing the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being 'non-negotiable' or 'not negotiable', and

(ii) is subject to rules of procedure as referred to in article 2.4, which include adequate provisions relating to the transfer of that record to a further holder and the manner in which the holder of that record is able to demonstrate that it is such holder.

"1.14 'Negotiable transport document' means a transport document that indicates, by wording such as 'to order' or 'negotiable' or other appropriate wording recognized as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being 'non-negotiable' or 'not negotiable'.

"1.15 'Non-negotiable electronic record' means an electronic record that does not qualify as a negotiable electronic record.

"1.16 'Non-negotiable transport document' means a transport document that does not qualify as a negotiable transport document.

"1.17 'Performing party' means a person other than the carrier that physically performs [or fails to perform in whole or in part] any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term 'performing party' does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee.

"1.18 'Right of control' has the meaning given in article 11.1.

"1.19 'Shipper' means a person that enters into a contract of carriage with a carrier.

"1.20 'Transport document' means a document issued pursuant to a contract of carriage by a carrier or a performing party that

"(a) evidences a carrier's or a performing party's receipt of goods under a contract of carriage, or

"(b) evidences or contains a contract of carriage,

or both."

**(a) General remark**

72. It was noted that the order in which definitions were presented in draft article 1 was based on the alphabetic order in the original English version of the document. It was generally agreed that the readability of the draft instrument would be improved if those definitions were arranged according to a more logical structure by first listing the various parties that might intervene in the contractual relationships covered by the draft instrument and then listing the technical terms used in the draft provisions. It was observed that particular attention would need to be given to those definitions that might influence the determination of the sphere of application of the draft instrument.

**(b) Definition of "carrier" (draft article 1.1)**

73. It was recalled that the definition of "carrier" in the draft instrument followed the same principle as laid down in the Hague-Visby Rules and the Hamburg Rules, under which the carrier was a contractual person. A carrier might have entered into the contract either on its own behalf and in its own name or through an employee or agent acting on its behalf and in its name. A carrier would typically perform all of its functions through such persons (A/CN.9/WG.III/WP.21, annex, para. 2). However, a concern was expressed that the definition of "carrier" did not make sufficient reference to the parties on whose behalf a contract of carriage was made. It was stated that the position of freight forwarders under the draft instrument was not entirely clear, as these parties were arguably covered by the definition of carrier (A/CN.9/WG.III/WP.21/Add.1, para. 11). Another concern was expressed that, as currently drafted, the definition of "carrier" might not make it sufficiently clear that it was intended to cover both natural and legal "persons".

74. While it was generally agreed that the draft definition of "carrier" constituted an acceptable basis for continuation of the discussion, some felt that further explanations would need to be given in the course of the preparation of the draft instrument as to the reasons for which a simpler definition of "carrier" had been proposed, in contrast with the more complex but perhaps also more precise definitions contained in existing maritime transport conventions.

**(c) Definition of "consignee" (draft article 1.2)**

75. It was recalled that the definition of "consignee" was based on the definition contained in article 1 (4) of the Hamburg Rules, with added reference to the contract of carriage or the transport document on the basis of which the consignee became entitled to take delivery of the goods. It was explained that the additional reference was intended to exclude a person who was entitled to take delivery of the goods on some other basis than the contract of carriage, e.g. the true owner of stolen goods (A/CN.9/WG.III/WP.21, annex, para. 3). A question was raised as to whether the draft definition was to be interpreted as making it impossible for the consignee as defined to delegate the exercise of its right to take delivery of the goods to another person. Another question was raised as to the reasons for which specific mention was made of the contract of transport, the transport document and the electronic record. It was questioned whether it was appropriate to place the contract of carriage (which was presumably the only source of the consignee's entitlement) on

the same level as the transport document or its electronic equivalent. Support was expressed for deleting the reference to "a transport document or electronic record". It was stated in response that the need to identify various possible sources of the consignee's entitlement to take delivery of the goods came from the fact that, in certain circumstances or in certain legal systems, the right evidenced by the transport document might be different from the right evidenced by the original contract of carriage, although the transport document would always be issued for the execution of the contract of carriage. In the context of that discussion, a concern was expressed that the reference to the transport document might be misunderstood as covering also documents such as warehouse receipts. With a view to avoiding misunderstanding as to the origin of the consignee's entitlement to take delivery, it was suggested that the definition might be redrafted along the following lines: "'Consignee' means a person entitled to take delivery of the goods under a contract of carriage, which may be expressed by way of a transport document or electronic record". Another suggestion was that a reference to the controlling party might need to be introduced in the definition of "consignee".

76. The Working Group took note of those questions, concerns and suggestions for continuation of the discussion at a later stage.

**(d) Definition of "consignor" (draft article 1.3)**

77. It was recalled that the definition of "consignor" might include the shipper, the person referred to in article 7.7 or somebody else who on their behalf or on their request actually delivered the goods to the carrier or to the performing party (A/CN.9/WG.III/WP.21, annex, para. 4). The definition of "consignor" was also intended to include the person who actually delivered the goods to the carrier in cases where such person was a person other than the "free on board" (FOB) seller or the agent, not being the shipper, who nevertheless was mentioned as the shipper in the transport document. That person who actually delivered the goods had no liabilities under draft article 7.7 or under draft article 11.5. Its only right was to obtain a receipt pursuant to draft article 8.1 from the carrier or performing party to whom it actually delivered the goods (ibid., paras. 118-119).

78. Wide support was expressed in favour of introducing in the draft instrument a definition of "consignor" based on the draft provision. A suggestion that mention should be made that the consignor was acting as an agent of the shipper was objected to on the grounds that the consignor, although presumably acting on behalf of the shipper would not necessarily act as an agent. The consignor might be acting on the basis of it own obligations, for example pursuant to the contract of sale. Support was expressed for the introduction of a mention that the consignor delivered the goods "on behalf" of the shipper.

79. As to the delivery of the goods "to a carrier for carriage", a suggestion was made that additional language should be introduced to clarify that the consignor should deliver the goods to the "actual" or "performing" carrier. That suggestion was supported, although the view was expressed that the words "a carrier" sufficiently addressed the possibility that a performing party might intervene in addition to the original carrier.

80. A view was expressed that, in possibly revising the current definition of "consignor" the Working Group might consider the text of paragraph 5 of article 1

of the United Nations Convention on Multimodal Transport of Goods (1980). The Working Group took note of that view.

**(e) Definition of "container" (draft article 1.4)**

81. Various views were expressed regarding the draft definition. One view was that the text was too broadly worded to constitute a workable definition. In particular, the use of the word "includes" made it an open-ended definition that might encompass packaging techniques that would not meet the criteria generally expected to be met by sea-going containers, particularly if transportation as deck cargo was involved. It was suggested that the definition should be limited to "containers designed for transport at sea". As a matter of drafting, the view was expressed that the opening words "'Container' includes any type of container" introduced an element of circularity that was unacceptable in a formal definition. Yet another view was that a specific definition of "container" was useless since containers as any other type of packaging should be covered by the definition of "goods" under draft article 1.11.

82. With a view to alleviating some of the concerns that had been expressed with respect to a broad definition of "container", it was pointed out that the draft provision had been introduced not as a general and theoretical definition but exclusively for the purposes of the provisions where the notion of "container" was used in the draft instrument, namely the provisions on deck cargo (draft article 6.6), the provisions regarding liability, which also referred to such notions as "package" and "shipping unit" (draft article 6.7), and the provisions on evidence, which dealt with the special case where goods were delivered to the carrier in a closed container (draft article 8.3). While support was expressed for the view that it might be necessary to consider exclusively containers designed for sea transport in the context of the provision on deck cargo, it was felt by a number of delegations that a broader definition might be acceptable in the context of draft articles 6.7 and 8.3. The Secretariat was requested to prepare a revised definition, with possible variants reflecting the above-mentioned views and concerns, for consideration at a future session.

**(f) Definition of "contract of carriage" (draft article 1.5)**

83. The view was expressed that the definition was too simplistic and might require a more detailed consideration of the various obligations of the carrier, namely to receive delivery of the goods, to carry them from one place to another and to deliver them at the place of destination. It was also suggested that the definition of the contract of carriage should not only mention the carrier but also the other party involved, i.e., the shipper. As a matter of drafting, it was suggested that the definition of the contract of carriage should not directly refer to the "carrier" but more generally to a "person" (who would become a carrier by virtue of the contract).

84. Another view was that defining the contract of carriage as a contract where the carrier "undertakes" to carry the goods might conflict with the approach taken in draft article 4.3.1, under which the contract of carriage might result in a situation where the carrier would "arrange" for the goods to be carried by another carrier. It was stated that the definition contained in draft article 1.5 was preferable in that

respect since it avoided any ambiguity as to the respective roles of a carrier and a freight forwarder. It was pointed out in response that there was no contradiction between defining, on the one hand, the contract of carriage as one where the carriers "undertakes" an obligation, and establishing, on the other hand, that in addition to the initial contract of carriage another contract may be concluded between the initial carrier and a freight forwarder.

85. The discussion focused on the use of the words "wholly or partly", which had been included to cover carriage preceding or subsequent to carriage by sea if such carriage was covered by the same contract. It was proposed by delegations that favoured limiting the scope of the draft instrument to port-to-port transport that those words should be deleted or placed between square brackets. It was pointed out that keeping those words was more in line with the provisional working assumption made by the Working Group that the draft instrument should be prepared with door-to-door transport in mind. In addition, it was pointed out that if the words "wholly or partly" were deleted, the scope of the draft instrument would be limited to contracts involving exclusively sea transport. Thus, even the sea segment of a contract of carriage involving also transportation by other means would be excluded from the scope of the draft instrument. However, it was generally felt that such a limitation of the sphere of application of the draft instrument would be excessive. After discussion, it was decided that the words "wholly or partly" would be maintained in the draft provision. With a view to facilitating further discussion regarding the possible implications of the draft instrument in the context of door-to-door transport, it was also agreed that the words "wholly or partly" should be identified by adequate typographical means as one element of the draft instrument that might require particular consideration in line with the final decision to be made regarding the scope of the draft instrument.

**(g) Definition of "contract particulars" (draft article 1.6)**

86. It was questioned whether the definition of "contract particulars" was necessary given that draft article 8.2 broadly included the features of contract particulars. It was suggested that article 1.6 operated merely as the element of an index rather than as a formal definition. The Working Group acknowledged that draft article 1.6 introduced a new term which had a close and direct relevance to draft article 8.2 and a suggestion was made to postpone consideration of this definition until draft article 8.2 had been considered. This postponement was agreed to but it was noted that the definition might contain contradictions when read together with draft article 1.20, which required that a transport document should evidence or contain a contract of carriage. By contrast the definition of contract particulars referred to any information "relating to the contract of carriage". It was suggested that the text should indicate more clearly what that phrase referred to. In this respect it was suggested that when the Working Group considered draft articles 1.9 and 1.20 it consider whether the requirement that an electronic communication or a transport document evidences a contract of carriage was really necessary. It was suggested that it would be more relevant for the transport document or electronic record to evidence receipt of the goods. It was also noted that draft article 1.7 when read with draft article 8.2 failed to include a reference to the shipper notwithstanding draft article 7.7, which referred to a shipper as identified in the contract particulars. The Working Group agreed that these concerns should be considered in redrafting the definition.

**(h) Definition of "controlling party" (draft article 1.7)**

87. The Working Group took note that the definition of "controlling party" was listed merely as an index reference rather than as a comprehensive definition. It took note that the term was referred to in draft articles 11.2 and the term "right to control" was referred to in draft article 1.18. It was suggested that definitions that were used in the draft instrument should be self-contained definitions and not merely index references. However, it was observed that the index referencing was a useful drafting method to shorten the substantive provisions. Noting the concerns that were expressed, the Working Group agreed that the definition should be retained for further discussions.

**(i) Definitions of "electronic communication" (draft article 1.8) and "electronic record" (draft article 1.9)**

88. The Working Group heard that these provisions had been drafted taking account of the work of the UNCITRAL Working Group on Electronic Commerce. It was noted that the draft definitions differed from the terms used in the UNCITRAL Model Law on Electronic Commerce by referring to "electronic communications" rather than "data message" and by including a reference to "digital images". The Working Group agreed that whilst it was not mandatory to preserve at any cost a term used in existing UNCITRAL texts, it was important to consider the reasons for making such changes and examine the implications of these changes *vis a vis* the UNCITRAL Model Law on Electronic Commerce. The Working Group also heard that the draft instrument had been drafted in recognition of the language used in the UNCITRAL Model Law on Electronic Commerce and the Model Law on Electronic Signatures but it might be necessary to adjust the language of these texts to suit the specific structure of the draft instrument. While it was observed that the use of digital imaging was increasingly relied upon in marine transport (a reason for which the draft expressly referred to that term), it was widely felt that further consideration would need to be given to the reasons for which the central notion of "data message" might not be used in the draft instrument. In particular, it was questioned whether the need to introduce a reference to digital imaging (which was already implicitly covered by the broad definition of "data message" in the UNCITRAL Model Law on Electronic Commerce) would justify doing away with such an essential notion. A concern was expressed that the reference in draft article 1.9 to information that was attached "or otherwise linked" could be too broad and undermine the contractual relationship between the carrier and consignee because it could allow the carrier to include additional contractual terms after the electronic record had been issued. Another concern was expressed that the reference in the definition of "electronic record" to "one or more messages" implied that there could be several messages constituting an electronic record and that it could be problematic to identify these. It was suggested that a small expert group be convened to examine provisions relating to electronic commerce in more detail.

**(j) Definition of "freight" (draft article 1.10)**

89. A concern was expressed that the definition of freight was incomplete in that it failed to state the person who was liable to pay the freight. However, it was agreed that the role of the definition was simply to describe what freight was and that

issues relating to the freight namely to whom it should be paid and by whom could be dealt with elsewhere.

**(k) Definition of "goods" (draft article 1.11)**

90. A concern was expressed that the reference in the definition of "goods" that a carrier or a performing party "received for carriage" rather than "undertakes to carry" may mean that the definition failed to cover cases where there was a failure by the carrier to receive the goods or load cargo on board a vessel. It was said that the current reference only to receipt of goods was too narrow. Alternatively it was suggested that the definition be simplified by removing any reference to receipt of the goods. It was decided that the Secretariat should prepare two alternative texts taking account of each of these approaches.

**(l) Definition of "holder" (draft article 1.12)**

91. The suggestion was made that the term "for the time being" was unnecessary. Support was expressed for maintaining a requirement that the holder should be in "lawful" possession of a negotiable transport document. It was suggested that the definition should reflect the simple and widely understood distinction between negotiable documents "to order", bearer documents and non–negotiable documents naming the consignee.

**(m) Definitions of "negotiable electronic record" (draft article 1.13) and "non-negotiable electronic record" (draft article 1.15)**

92. The Working Group accepted these definitions as a sound basis for further discussions.

**(n) Definition of "negotiable transport document" (draft article 1.14)**

93. It was suggested that there be a clearer explanation of the differences between negotiability and non-negotiability. It was noted that the question as to what constituted a document of title differed between jurisdictions. It was suggested that there was a need for more precision in understanding core terms such as "negotiable" in order to provide for appropriate rules on negotiable electronic records. In response it was noted that whilst it was important to be more precise in this area, particularly because it was a new area and was affected by national law, the Working Group should keep in mind that it could not regulate all consequences.

**(o) Definition of "non-negotiable transport document" (draft article 1.16)**

94. Although a suggestion was made that this definition was not necessary and should be deleted, the Working Group agreed to retain the definition for further consideration.

**(p) Definition of "performing party" (draft article 1.17)**

95. It was noted that in preparing the draft definition of "performing party" different views expressed during the consultation process were taken into account.

Some favoured including any party that performs any of the carrier's responsibilities under a contract of carriage if that party is working, directly or indirectly, for the carrier. Others advocated excluding the "performing party" definition entirely. The relatively restrictive definition in the current text was presented as a compromise (for further comments about the definition of the performing carrier ("performing party"), see paras. 14 to 21 of document A/CN.9/WG.III/WP.21).

96. It was suggested that the concept of the performing carrier ("performing party") should be deleted and that the contractual carrier (who should be the only person to respond to the claimant) should have the right of recourse against performing parties. It was added that the channelling of liability to a party (in this case the contracting party) would be preferable and that such channelling of liability worked in practice, as demonstrated for example by the International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969.

97. Another suggestion was to further restrict the notion of the performing party by excluding entities that handled and stored goods (such as operators of transport terminals) and include in the definition only true carriers.

98. It was also suggested that the restriction of the definition by using the concept of "physically performs" was arbitrary and would cause problems in practice (e.g. it would be difficult to establish with one limitation period who was the person to be sued, and might cause difficulties of interpretation in applying draft articles 4.2.1, 4.3 and 5.2.2). The definition of the "actual carrier" in article 1(2) of the Hamburg Rules was suggested to be preferable.

99. However, wide support was expressed for the presence of the notion in the draft instrument; its concept was also widely supported, including the use of the term "physically performs" as a way to limit the categories of persons to be included within the definition. It was considered that the notion of performing party was useful since it provided a meaningful protection to the claimant (it was in particular beneficial to the consignee to be able to hold the last performing carrier liable for the goods). It was indicated that the protection to the performing party as contained in draft article 6.10 as well as 6.3.1 (also known in some legal systems as "Himalaya clause") was an essential part of the role of "performing party" in the draft instrument.

100. It was also suggested that all of the options for the definition of "performing party" contained in the draft text and commentary should be retained for the time being.

101. It was stated that, while the definition should not be broadened, it would be useful to have some clarification as to how the persons that fell outside the definition of performing party would be treated as regards matters such as any right of suit against them and any liability limits and defences applicable to them.

102. It was suggested to replace "under a contract of carriage" with an expression such as "in the context of transport operations" or "in performing the transport operations" to indicate more clearly the relation of the performing party to the "contract of carriage". It was added in more general terms that the performing party was not a party to the contract of carriage between the shipper and the contracting carrier and that the drafting of the definition should be reviewed to make that clear.

In that connection, the question was raised whether it was necessary to address any obligations that the performing party was carrying out and which were not obligations assumed by the contracting carrier.

103. It was noted (without suggesting that the definition of "performing party" should necessarily be narrowed) that the Working Group would have to consider the possibility that a performing party (such as a warehouse operator) would be located in a State that was not a party to the convention being prepared. It was also observed that, to the extent operators of transport terminals would be performing parties, the Working Group would have to take into account a possible conflict between the draft instrument and the United Nations Convention on the Liability of Operators of Transport terminals in International Trade (Vienna, 1991).

104. Suggestions were made to simplify and shorten the drafting of the definition. It was suggested to delete the words "regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage" as unclear and as adding nothing substantial to the definition. The presence of the last sentence of the definition was supported because it clarified the defined concept. The Working Group considered that the words "[or fails to perform in whole or in part]" should be deleted.

**(q) Definition of "right of control" (draft article 1.18)**

105. It was noted that this was more a cross-reference than a definition. It was proposed that article 1.18 could therefore be deleted. However it was agreed to retain the definition for further consideration at a later stage.

**(r) Definition of "shipper" (draft article 1.19)**

106. The Working Group noted that the definition mirrored the definition of "carrier" in draft article 1.1. The shipper was a contractual party who might have entered into the contract either on its own behalf and in its own name or through an employee or agent acting on its behalf and in its name. A shipper would typically perform all of its functions through such persons. The shipper might be the same person as the consignee, as was the case in many FOB ("free on board") sales (A/CN.9/WG.III/WP.21, annex, para. 22).

107. Bearing in mind the concerns expressed in the context of the discussion of draft article 1.1, it was generally agreed that the draft definition of "shipper" constituted an acceptable basis for continuation of the discussion at a future session.

**(s) Definition of "transport document" (draft article 1.20)**

108. It was recalled that the definition of "transport document" should be read as preliminary to those of "negotiable transport document" and "non-negotiable transport document" in draft articles 1.14 and 1.16. Paragraph (a) would include a bill of lading issued to, and still in the possession of, a charterer, which does not evidence or contain a contract of carriage but functions only as a receipt, and some types of receipt issued before carriage or during transhipment. Paragraph (b) would include a negotiable bill of lading when operating as such, and a non-negotiable waybill (see A/CN.9/WG.III/WP.21, annex, para. 23).

109. The definition of "transport document" was generally supported by the Working Group on the basis that the two central functions of a transport document, namely, that of evidencing receipt of the goods and that of evidencing the contract of carriage, were appropriately encompassed by the definition. It was observed that the third traditional function of a bill of lading, namely, that of representing the goods, was not touched upon by the definition. A question was raised regarding the omission of any reference in that definition to negotiability particularly in light of draft articles 1.14 and 1.16, which respectively defined "negotiable transport document" and "non-negotiable transport document". In response, it was suggested that the definition of "transport document" was intended to be generic and to encompass both negotiable and non-negotiable transport documents so a reference to negotiability or to the function of the bill of lading as representing the goods was not required in that present definition.

110. In response to a question that was raised regarding the possibility that a transport document might "contain" a contract of carriage, it was pointed out that the words "evidences or contains a contract of carriage" in paragraph (b) were designed to accommodate different approaches in national laws to the question whether a transport document might evidence or contain a contract of carriage. In response to a question on whether paragraphs (a) and (b) represented alternative or cumulative functions, it was noted that the definition applied where the requirements in either (a) or (b) was satisfied or where the requirements in both paragraphs were met. Notwithstanding the above comments, that were thought to require further consideration in the preparation of a revised version of the definition of "transport document, the Working Group agreed to the retention of the text of draft article 1.20 as a sound basis for discussion of the remainder of the provisions contained in the draft instrument.

## 2. Draft article 5 (Obligations of the carrier)

111. Having completed its consideration of the draft definitions, the Working Group engaged in a reading of the provisions of the draft instrument concerning the obligations of the parties to the contract of carriage.

112. The text of draft article 5 as discussed by the Working Group was as follows:

"5.1 The carrier shall, subject to the provisions of this instrument and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

"5.2.1 The carrier shall during the period of its responsibility as defined in article 4.1, and subject to article 4.2, properly and carefully load, handle, stow, carry, keep, care for and discharge the goods.

"5.2.2 The parties may agree that certain of the functions referred to in article 5.2.1 shall be performed by or on behalf of the shipper, the controlling party or the consignee. Such an agreement must be referred to in the contract particulars.

"5.3 Notwithstanding the provisions of articles 5.1, 5.2, and 5.4, the carrier may decline to load, or may unload, destroy, or render goods harmless or take such other measures as are reasonable if goods are, or reasonably appear likely

during its period of responsibility to become, a danger to persons or property or an illegal or unacceptable danger to the environment.

"5.4 The carrier is bound, before, at the beginning of, [and during] the voyage by sea, to exercise due diligence to:

"(a) make [and keep] the ship seaworthy;

"(b) properly man, equip and supply the ship;

"(c) make [and keep] the holds and all other parts of the ship in which the goods are carried, including containers where supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.

"5.5 Notwithstanding the provisions of articles 5.1, 5.2, and 5.4, the carrier in the case of carriage by sea [or by inland waterway] may sacrifice goods when the sacrifice is reasonably made for the common safety or for the purpose of preserving other property involved in the common adventure."

**(a) Paragraph 5.1**

113. It was recognized that draft article 5.1 set out the basic obligation of the carrier to carry the goods to the place of destination and deliver them to the consignee. There was general agreement that the text as currently drafted, appropriately described some of the principal obligations of the carrier and was a sound basis on which to commence discussions. However, several suggestions were made for possible improvements of the text. One suggestion was that the obligation of the carrier should be more fully expressed by including a reference requiring the carrier to deliver the goods in the same condition that they were in at the time that they were handed over to the carrier. It was said that, if that additional reference were to be included, the relationship between draft article 5.1 and draft article 6.1 (which dealt with the liability of the carrier) might require further examination. The suggestion was objected to on the grounds that, in some circumstances, goods would change character during the course of carriage due to their inherent nature, which might alter as time passed. Examples were given, such as circumstances involving partial evaporation of the goods or processing of the goods while at sea. It was stated in response that the natural consequences of the passing of time should not serve as a pretext to exonerate the carrier from any obligation to preserve the initial condition of the goods. In the context of that discussion, it was pointed out that listing some but not all of the carrier's additional obligations among the primary obligation expressed in draft article 5.1 was unsatisfactory. It was also suggested that, in revising draft article 5, further attention might need to be given to the relevant provisions of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI).

114. Another suggestion was that the draft article, which was said to set out an incomplete description of the carrier's obligations, should also mention the requirement that the carrier should take charge of the goods. In that respect, it was suggested that, in more fully describing the carrier's obligations under draft article 5.1, reference might need to be made to draft article 4.1, which established the period of responsibility of the carrier.

115. Yet another suggestion was that the provision, whilst respecting to some extent the contractual freedom of the parties, should not leave the description of the obligations of the carrier entirely to contractual freedom, thus allowing the obligations of the carrier to be defined in adhesion contracts unfavourable to the shipper. It was pointed out that, under some existing national laws, the fundamental obligations of the carrier were set out in mandatory legislation that would not allow any deviation through contractual agreement. Reference was made to the comment in paragraph 59 of A/CN.9/WG.III/WP.21, which stated that the provisions of the draft instrument should "make clear that the terms of the contract do not stand alone". It was suggested that this point should be more clearly expressed in the draft provision. A widely shared view was that the extent to which the obligations of the carrier could be displaced through contractual agreement might need to be further considered in the context of draft article 17.

116. Notwithstanding the concerns and suggestions expressed in the course of the discussion, the Working Group provisionally agreed to retain the text of article 5.1 as drafted. It was widely thought that the above-mentioned concerns and drafting suggestions should be revisited at a later stage.

**(b) Paragraph 5.2.1**

117. An explanation was sought as to the relationship between draft article 5.2.1 and draft article 6.1, which dealt with the basis of liability of the carrier. In particular, concern was expressed as to the use of the words "properly and carefully". Furthermore, it was suggested that the carrier's obligation to carry and deliver the goods was already set out in draft article 5.1. It was also suggested that, if the provision were to apply to door-to-door transportation, it might need to be redrafted accordingly, since the current text appeared to use maritime transport terminology by its reference to loading, handling, stowing, carrying, keeping, caring for and discharging the goods. A concern was also expressed as to the extension of the corresponding requirement to the entire duration of the door-to-door transportation through the reference to draft article 4.1. Regarding the use of the words "properly and carefully", a widely shared view was that such wording, which originated in the Hague Rules and had enjoyed the benefit of extensive interpretation through case law worldwide, should be preserved in the draft instrument and possibly extended (together with the remainder of the provisions contained in draft article 5, with the exception of draft article 5.4) to the non-maritime segments of door-to-door transportation.

118. With respect to the duration of the period during which the carrier was responsible under draft article 5, the view was expressed that the reference to "the period defined in article 4.1" should be replaced by a reference to the period running from the time that the goods were taken over by the carrier until the time of their effective delivery. Making that period "subject to article 4.2" was said to be irrelevant. It was explained that the words "subject to article 4.2" had been intended as, and should be replaced by a reference to article 4.3. It was widely felt that, although the Working Group had not taken a final decision on the sphere of the application of the draft instrument, further attention would need to be given as to how the draft instrument would interplay with other unimodal transport conventions.

119. Notwithstanding that there was some support for omitting draft article 5.2.1, the Working Group provisionally agreed to retain the draft article given the extensive experience with analogous provisions in existing conventions such as article 3 (2) of the Hague Rules. It was also agreed that further study of the draft article should be undertaken to assess the interplay and the consistency between draft article 5.2.1 and draft article 6, as well as the effect of the various possible definitions of the period during which the obligation in draft article 5.2.1 would apply. The Secretariat was requested to prepare a revised draft, with possible alternative wordings reflecting the views and concerns expressed.

**(c) Paragraph 5.2.2**

120. It was noted that draft article 5.2.2 was designed to accommodate the practice of FIO (free in and out) and FIOS (free in and out, stowed) clauses, which were used in bulk cargo charter party trade, but were rare in liner trade. It was observed that the reason for agreeing on FIO(S) clauses were usually that the cargo owner could perform the operations at a lower price (e.g., because of volume rebate given by the stevedore company); alternatively, such clauses were agreed where the cargo owner was in a better position to undertake certain operations (e.g., because of its particular experience with loading and stowing certain type of cargo). Those reasons might also be combined. It was said that in particular when FIO(S) clauses were agreed for the second reason it was reasonable that they should in some way diminish the carrier's liability for those operations. However, it was responded that the circumstances in which shippers participated in the loading operations differed, depending on circumstances such as the size of the company, the type of cargo, circumstances in the port, the technology used in safekeeping the goods and that it was inconceivable that a treaty should in a general way allow the carrier to be relieved of its liability for loading and unloading when such clauses were used.

121. It was observed that, even if cargo was loaded by the shipper in the context of a FIO(S) clause, it was much less likely that the consignee would perform unloading operations (in such a case the effect of the clause, which covered both loading and unloading operations, was that unloading was done by the carrier or someone else on behalf of the cargo owner). That possibility (which was envisaged in the text by the words "or on behalf of the shipper, the controlling party of the consignee") was criticized in that the carrier should not be able to perform an operation "on behalf" of the cargo owner and be able to diminish its liability for it.

122. It was stated that under some legal systems the clause in current practice only affected the question as to who was to bear the costs of operations and in principle did not diminish the liability if the carrier. The overriding obligation of the carrier to keep the ship and other cargo safe was said to be in line with that approach.

123. The view was expressed that FIO(S) clauses might be appropriate for maritime (port-to-port) carriage but had no place in the global transport service of door-to-door transport contracts where it would be agreed that loading and unloading operations in an intermediary port should be performed by the cargo owner and that the agreement would shift the risk of those operations on the cargo owner in the midst of the service. It was thus suggested that the draft provision should be deleted. That view received considerable support and it was considered that the impact of those clauses on door-to-door operations needed to be evaluated.

124. According to others, however, the clauses should be recognized as dividing the responsibilities and risks between the shipper and the carrier, and as a consequence the clause should exonerate the carrier to the extent that the shipper undertook to carry out those obligations. Contractual freedom in that respect was desirable and had the beneficial effect of allowing the parties to carry out their business at the lowest possible costs by placing the obligations of loading and unloading on the persons that were best placed to carry them out.

125. It was noted that the draft provision referred in a broad manner to the obligations of article 5.2.1, which included also carrying, keeping and caring for goods. Wide support was expressed for the suggestion that the carrier should not be able to delegate contractually to the shipper such a broad array of obligations arising from the transport contract.

126. It was noted that pursuant to the current draft provisions a FIO(S) clause did not need to be expressly agreed or specifically negotiated, which raised public policy concerns. It was stated in response that, to the extent the manner of agreeing on such a clause was unclear, it should be clarified that they should be expressly agreed upon and also that a transfer to third persons had to be by express consent (but it was added that such a clarification did not mean that the clause did not transfer the liability for those operations to the cargo owner).

127. Different views were expressed as to what should be the appropriate rule for the draft instrument. There was general agreement with the proposition that even if the parties agreed on a FIO(S) clause, the draft instrument continued to apply. Support was expressed for the suggestion that the clause did not only affect the question of the costs of loading and unloading operations but also that thereby the carrier's responsibility for those operations was contractually diminished (otherwise the contractual freedom in this area was not apt to achieve optimum commercial benefits). Considerable support, however, was given to the suggestion that the clause should only affect the question as to who should bear the costs of loading and unloading operations and that the application of the clause should not diminish the carrier's liability for those operations. No final conclusion was reached on this point, but it was accepted that the point needed to be clarified in the draft instrument. After discussion it was decided that the provision should be placed between square brackets as an indication that the concept had to be reconsidered by the Working Group including as to how it related to the provisions on the liability of the carrier. It was suggested that a written information about the practice of FIO(S) clauses should be prepared for a future session of the Working Group to assist it in its considerations.

**(d) Paragraph 5.3**

128. The attention of the Working Group was drawn to the existence of rules regarding the transport of dangerous goods under other unimodal transport conventions such as COTIF, CMR and CMNI. In the context of door-to-door transportation, the interplay between the draft instrument and those conventions would need to be further studied.

129. With respect to the substance of draft article 5.3, support was expressed in favour of the principles on which the provision was based. A widely shared view was that a distinction might need to be drawn in the draft article according to

whether or not the carrier had been informed about the nature of the goods. It was suggested that the scope of the provision might need to be restricted to circumstances where a specific danger resulted from the transport of certain goods or the carrier had not been informed of the dangerous nature of the goods. However, other delegations expressed the contrary view that regardless of knowledge, for safety reasons, the carrier should have a right to destroy the goods if necessary. Another suggestion was that the provision should deal with the issue of the possible compensation owed by the shipper to the carrier for the additional costs involved in the handling of the goods in the circumstances envisaged under draft article 5.3. Yet another suggestion was that the text of the draft article would need to indicate more clearly its relationship with the carrier's obligations to maintain the vessel as seaworthy under draft article 5.4. It was stated that the text of draft article 5.3 would also need to include safeguards against unjustified actions by the carrier. A concern was expressed that, as presently written the draft provision might be misleading, especially in view of the reference to draft article 5.3 included in draft article 6.1.3 (x) providing for exclusions of liability of carrier. It was stated that a difficulty arose because the combined draft provisions attempted to deal at the same time with the right of the carrier to destroy the goods (without distinction according to whether or not the carrier knew of the dangerous nature of the goods) and with the obligations and liabilities of the shipper. It was stated that those issues were better dealt with in article 13 of the Hamburg Rules.

130. After discussion, the Working Group generally agreed that the text of draft article 5.3 required further improvement. As an alternative to the current text of the provision, the Secretariat was requested to prepare a variant based on the principles expressed in article 13 of the Hamburg Rules regarding the powers of the carrier in case of emergency arising in the transport of dangerous goods. It was also agreed that the issue of compensation that might be owed to the carrier or the shipper in such circumstances might need to be further discussed in the context of draft article 7.5.

**(e) Paragraph 5.4**

131. The Working Group recalled its preliminary discussion regarding draft article 5.4 (see above, para. 43) and confirmed its broad support for imposing upon the carrier an obligation of due diligence that was continuous throughout the voyage by retaining the words that were currently between square brackets "and during" and "and keep". However, a concern was reiterated that the extension of the carrier's obligation to exercise due diligence in respect of the whole voyage put a greater burden on carriers and could lead to the associated costs being passed on in the form of higher freights.

132. It was observed that the wording of draft article 5.4 was inspired by the Hague Rules and its retention would preserve the benefit of extensive experience and a body of case law regarding the interpretation of that provision in maritime transport. It was pointed out, however, that the text of draft article 5.4 made it unsuitable for other modes of transport.

133. It was suggested that improvements would need to be introduced in the text to clarify the allocation of the burden of proof regarding the carrier's obligation of due diligence. In particular, a question was raised as to whether the shipper, in addition

to bearing the burden of proof as to the cause of loss or damage to the goods under draft article 6.1.3, would also have to prove failure by the carrier to exercise due diligence under draft article 5.4.

134. Another question was raised as to the duration of the period of responsibility of the carrier under draft article 5.4, which was imposed on the carrier "before" the voyage by sea, without specifying a point in time for the beginning and the end of the period. It was suggested that the obligation of due diligence of carrier should not come to an end at the time of arrival of the ship at the port of its destination but at least until the goods had been discharged. To that effect, it was suggested that the words "and keep" should not be retained in subparagraphs (a) and (c). Instead, a sentence should be added at the end of draft article 5.4 along the following lines: "The obligations set out above must be fulfilled throughout the period during which the goods are on board the ship and during discharge of the goods from the ship".

135. Another suggestion was made that wording along the following lines should be added to accommodate the specific needs arising from the transport of chilled and frozen products: "Following delivery of goods which have been carried under controlled temperatures (whether in containers, or otherwise), the carrier must, if requested so to do by any of the persons referred to in article 13.1, make available within 14 days of being so requested copies of such documentary evidence and or electronically stored information (such as recording charts or downloaded electronically stored data) which it has relating to the temperatures at which the goods have been carried".

136. After discussion, the Working Group agreed that the current text of draft article 5.4 constituted a workable basis for continuation of its deliberations. The Working Group took note of the various suggestions that had been expressed in respect of the draft provision. It was generally agreed that the draft provision would need to be further considered in light of similar or comparable provisions in other unimodal transport conventions.

### (f) Paragraph 5.5

137. Questions were raised as to the need and purpose of draft article 5.5, including its relationship with chapter 15, which dealt with general average.

138. It was stated that draft chapter 15 referred to the adjustment of general average and to the applicability of contractual rules dealing with details for such adjustment, whereas draft article 5.5 expressed a general principle of law, which, on the one hand, expressed the rule generally recognized in legal systems that the sacrifice of property of others was justified in certain circumstances and, on the other hand, provided a juridical basis for general average as dealt with in draft chapter 15. It was argued that the expression of that principle, notwithstanding possible drafting improvements, was useful since it might facilitate the operation of the York-Antwerp Rules (1994) on general average. It was further stated that draft article 5.5 provided an exception (in addition to the one stated in draft article 5.3) to the duty of care as specified in the other provisions of draft chapter 5. Various statements were made that draft article 5.5 was consistent with the promotion of safety at sea.

139. However, strong objections were raised against the draft article, both as regards its overall approach, the principles it expressed as well as to its drafting.

Some of those criticizing the draft provision considered that it should be deleted, while others were of the view that the Working Group should improve the wording of the draft provision and retain it, whether in its present place or by connecting it with draft article 15.

140. It was considered that draft article 5.5 established a new power, which so far had not been expressed in legal texts of a similar nature, without clarifying and circumscribing the limits of the power. It was considered that general average was a traditional and well-established legal concept and that it was inappropriate to add to it a sweeping legal provision such as the one in draft article 5.5. Moreover, draft article 5.5 went beyond the traditional concept of general average (in particular because it was not restricted by the notion of peril endangering the common adventure at sea), was unjustifiably favourable to the carrier and also that draft article 15 (which was closely based on article 24 of the Hamburg Rules) was sufficient to deal with the situations where the carrier had to sacrifice goods for the common safety of a common maritime adventure.

141. By way of explanation it was said that if the sacrifice of goods was caused by unseaworthiness of the vessel and if a causal link was established between the unseaworthiness and the need for sacrifice, the carrier would be liable. However, it was said in reply that the draft article placed the cargo owner in a difficult position given the liability provision in draft article 6.1.3 (according to which the carrier was presumed not to be at fault for loss or damage to goods); in particular the burden of proof that the cargo owner had to discharge was difficult.

142. It was noted that the draft article did not refer to the preservation of the vessel or the cargo from a common peril, which was an essential element of a general average situation. Such incomplete treatment of the right to sacrifice goods was said to be undesirable and might lead to unpredictable consequences. It was also not clear, as a matter of drafting, what the relationship was between the draft article and draft article 15. Moreover, it was reported that the York-Antwerp Rules (1994) were under consideration for a possible revision, which was said to be a further reason against including untested legislative provisions in the draft instrument. It was said that, as a matter of drafting approach, it was preferable to positively state duties of care of the carrier (and combine those duties with presumptions of non-liability) and that it was less desirable to positively state a right to disregard a duty of care. In any case, if any general principles were to be required regarding general average, it was said to be preferable to deal with them in the context of draft article 15.

143. After considering the differing views, it was noted that the Working Group was divided between those who favoured the elimination of draft article 5.5 and those that preferred it to be kept. Those that favoured keeping the provision considered that it was in need of further study and clarification (as the discussion had indicated). As an indication that the Working Group was not in a position to decide whether to keep the draft provision and an indication that further consideration of its substance and drafting was necessary, the Working Group decided to place the draft article between square brackets.

### 3. Draft article 7 (Obligations of the shipper)

144. The text of draft article 7 as discussed by the Working Group was as follows:

"7.1 Subject to the provisions of the contract of carriage, the shipper shall deliver the goods ready for carriage and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a container or trailer packed by the shipper, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods will withstand the intended carriage, including loading, handling and discharge of the container or trailer, and that they will not cause injury or damage.

"7.2 The carrier shall provide to the shipper, on its request, such information as is within the carrier's knowledge and instructions that are reasonably necessary or of importance to the shipper in order to comply with its obligations under article 7.1.

"7.3 The shipper shall provide to the carrier the information, instructions, and documents that are reasonably necessary for:

"(a) the handling and carriage of the goods, including precautions to be taken by the carrier or a performing party;

"(b) compliance with rules, regulations, and other requirements of authorities in connection with the intended carriage, including filings, applications, and licences relating to the goods;

"(c) the compilation of the contract particulars and the issuance of the transport documents or electronic records, including the particulars referred to in article 8.2.1(b) and (c), the name of the party to be identified as the shipper in the contract particulars, and the name of the consignee or order, unless the shipper may reasonably assume that such information is already known to the carrier.

"7.4 The information, instructions, and documents that the shipper and the carrier provide to each other under articles 7.2 and 7.3 must be given in a timely manner, and be accurate and complete.

"7.5 The shipper and the carrier are liable to each other, the consignee, and the controlling party for any loss or damage caused by either party's failure to comply with its respective obligations under articles 7.2, 7.3, and 7.4.

"7.6 The shipper is liable to the carrier for any loss, damage, or injury caused by the goods and for a breach of its obligations under article 7.1, unless the shipper proves that such loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or the consequences of which a diligent shipper was unable to prevent.

"7.7 If a person identified as "shipper" in the contract particulars, although not the shipper as defined in article 1.19, accepts the transport document or electronic record, then such person is (a) subject to the responsibilities and liabilities imposed on the shipper under this chapter and under article 11.3, and (b) entitled to the shipper's rights and immunities provided by this chapter and by chapter 13.

"7.8 The shipper is responsible for the acts and omissions of any person to which it has delegated the performance of any of its responsibilities under this

chapter, including its sub-contractors, employees, agents, and any other persons who act, either directly or indirectly, at its request, or under its supervision or control, as if such acts or omissions were its own. Responsibility is imposed on the shipper under this provision only when the act or omission of the person concerned is within the scope of that person's contract, employment, or agency".

(a) **Paragraph 7.1**

145. Notwithstanding the statement made in paragraph 112 of the note by the Secretariat (A/CN.9/WG.III/WP.21) that the "basic obligation of the shipper is to deliver the goods to the carrier in accordance with the contract of carriage", it was suggested that, in fact, the basic obligation of the shipper was to pay the freight. Some delegations took the view that payment of freight was a primary obligation of the shipper with other obligations being ancillary to this one. However, an alternative view taken was that, even if the payment of freight was the most important obligation of the shipper, that matter was already dealt with in draft article 9 of the draft instrument. It was suggested that, to reflect more clearly the importance of the shipper's obligation to ensure that the goods, when delivered to the carrier, were in a condition to withstand carriage, the word "and" should be removed from the statement of the shipper's obligation in the first sentence of draft article 7.1. Wide support was expressed in favour of that suggestion.

146. Another suggestion was made that, as currently drafted, the obligation of the shipper to deliver the goods in a condition ready for carriage was subject to the provisions of the contract of carriage and that if the intention was that this should be a mandatory obligation then the opening words of draft article 7.1 ("Subject to the provisions of the contract of carriage") should be deleted. It was observed that, as presently drafted, the provision could allow the parties to agree to change the obligation set out in draft article 7.1. It was stated that any such change should only apply as between the parties to the contract of carriage and that it should not apply to third parties. It was also stated that subjecting the shipper's obligation to deliver the goods to the provisions of the contract of carriage could open a possibility for abuse by a carrier who might seek to include more onerous clauses. It was also said that there appeared to be an imbalance between the carrier's obligation of care in respect of the goods as set out in draft article 5.2.1 and the obligations of the shipper in respect of the goods. It was pointed out that the obligation of the shipper in relation to the condition and packaging of goods was set out in far more detail than the corresponding obligation of the carrier and that this could cause confusion and also result in evidentiary problems. It was suggested that greater balance could be achieved by relying on the approach taken in articles 12, 13 and 17 of the Hamburg Rules. Support was expressed in favour of that suggestion. In opposition to that suggestion, it was said that the obligations of the shipper in draft article 7.1 and those of the carrier in draft article 5 were different types of obligations and were correctly drafted in slightly different levels of detail.

147. It was suggested that the second sentence in draft article 7.1 should be deleted given that the definition of "goods" in draft article 1.11 also included "any equipment and container". However, the suggestion was objected to on the grounds that that the inclusion of the second sentence was necessary to put beyond doubt that the shipper's obligation extended to the proper stowage of the cargo in

containers or trailers, and to address the general concern that security issues should be given more prominent status. Examples were given of situations, particularly in the ferry industry, where the securing of the cargo in trailers on board ferry vessels was particularly important. In view of that concern, it was agreed that the second sentence should be retained. However, the Working Group noted that the relationships between draft articles 7.1 and 1.11 might need to be further reviewed at a later stage to avoid any possible inconsistency.

148. After discussion, the Working Group agreed to delete the word "and" from the second line in draft article 7.1 and place the phrase " Subject to the provisions of the contract of carriage" in square brackets pending further consultations and discussions on the scope of the obligation of the carrier and the extent to which it was subject to freedom of contract. The suggestion to prepare alternative wording based on articles 12, 13 and 17 of the Hamburg Rules was noted by the Working Group. In addition, it was noted that the provision might need to be reviewed for consistency in terminology in the six official languages.

**(b) Paragraph 7.2**

149. The view was expressed that draft article 7.2 was inappropriate, since it introduced a subjective element into the mutual duties and obligations between the shipper and the carrier, and since it constituted an additional burden upon the carrier, which might lead to unnecessary litigation. In addition, it was stated that draft article 7, which dealt with the obligations of the shipper, should not be used to establish an obligation of the carrier. It was thus suggested that the draft provision should be deleted and that the issue of information and instructions to be provided by the carrier to the shipper should be dealt with on a case-by-case basis relying on existing trade practices.

150. However, the widely prevailing view was that draft article 7.2 should be maintained since it provided an appropriate balance between the duties of the shipper (as dealt with in draft chapter 7 and elsewhere) and the duties of the carrier to provide the shipper with the necessary information enabling the shipper to fulfil its duties. It was observed that, even if the duty such as the one in draft article 7.2 was not stated expressly, it existed as a principle anyway, as it was essentially dictated by the mutual duty of the contract parties to cooperate in good faith. In that connection it was stated that the draft instrument should contain a provision (included in other UNCITRAL texts such article 7 of the United Nations Convention on Contracts for the International Sale of Goods) to the effect that in the interpretation of the instrument regard was to be had to the observance of good faith. Nevertheless, it was widely considered that in this particular context it was beneficial to give expression to the general duty of good faith by a provision along the lines of draft article 7.2.

151. As to the drafting of the provision, it was said that it was necessary to make sure that it was clear in all language versions that the qualifying concept "reasonably necessary" referred to both "information" and "instructions". Some doubts were expressed as to whether the draft provision, which focused on the duties of the carrier, was properly placed in the chapter covering the obligations of the shipper. However, it was considered that, in view of the close link between draft article 7.2 and the other provisions of draft chapter 7, the placing of the draft provision was not necessarily inappropriate. It was suggested that in view of the

link between the carrier's duty under draft article 7.2 and the shipper's duties under draft chapter 7, it must follow that the shipper was not liable for non-fulfilment of its duties if the carrier did not provide properly requested information and instructions, and that it might be desirable to clarify that understanding. It was observed that article 7 of the Budapest Convention required a written form for information to be given in a similar context and that the question of form in draft article 7.2 might also be considered.

152. Subject to the expressed observations, the Working Group decided to retain the draft provision with a view to considering its details at a future session.

**(c) Paragraph 7.3**

153. Wide support was expressed for the formulation of draft article 7.3, which set out the requirement that the shipper should provide to the carrier certain information, instructions and documents. The view was expressed that the reference in paragraph (c) to "the name of the party identified as the shipper in the contract particulars" could create problems in practice when such information was contained in, for example, a bill of lading, with the name of the documentary shipper being different from the name of the contractual shipper. It was suggested that the words "contract particulars" should be replaced by the words "transport document". In response, it was observed that the definition of "contract particulars" already referred to any information that appeared in "a transport document". On that basis, the text of draft article 7.3 was approved as a sound basis for continuation of the discussion at a later stage.

**(d) Paragraph 7.4**

154. It was stated that draft article 7.4, which involved a mutual obligation on the shipper and carrier to provide information, instructions and documents in a timely manner and that these be accurate and complete, was an appropriate starting point for further discussions. The Working Group agreed that the text should be retained for further consideration.

**(e) Paragraph 7.5**

155. It was observed that draft article 7.5 imposed on both the shipper and the carrier strict liability to each other, to the consignee or to the controlling party for any loss or damage caused by either party's failure to provide the information required to be provided under draft articles 7.2, 7.3 or 7.4. It was said that this provision was important given that, in modern times, actual physical inspection of goods was rare and therefore the exchange of information relating to goods between shippers and carriers was of paramount importance to the success of carriage operations.

156. However, concerns were expressed with the current text of draft article 7.5. One concern was that the type of liability established by draft article 7.5 was inappropriate given that the obligations set out in draft articles 7.2, 7.3 and 7.4 were not absolute and involved subjective judgements. For example, paragraph 7.3 referred to the shipper providing information that was "reasonably necessary". Imposing strict liability for failure to comply with what was described as a flexible

and imprecise obligation seemed excessive to some delegations. It was suggested that, in certain circumstances, a shipper might have a number of reasons for not providing the relevant information, for example where the shipper reasonably believed that the carrier was already in possession of the relevant information. Furthermore, it was stated that an approach based on strict liability might be inappropriate, for example, where a shipper had failed to provide relevant particulars under article 8.2.1(b) or (c) to be included in the transport document before receipt of the goods by the carrier (as required under article 8.2.1). In such a case, the effect of draft article 7.5 would be to make the shipper strictly liable for failing to comply with its obligation under article 7.4 to provide information "in a timely manner". It was stated that, as currently drafted, the provision was ambiguous and that it was not clear what its effect would be either as to liability to a consignee or a controlling party or as to whether a carrier would be liable to a consignee for the shipper's failure to provide adequate particulars and vice versa. It was suggested that a revised draft of the provision might need to differentiate between contractual liability to the other parties involved and extra-contractual liability to third parties.

157. Another concern was that the provision did not accommodate the situation where both the shipper and the carrier were concurrently liable by allowing for shared liability in such situations. As well, it was suggested that the provision was ambiguous in that it was not clear what was meant by "loss or damage" in draft article 7.5 as compared, for example, to the phrase used in draft article 7.6, which referred to "loss, damage or injury". It was suggested that the Working Group should examine that question to better delimit what loss or damage was being referred to. More generally, it was suggested that the obligation imposed by draft article 7.5 should be further examined in detail to clarify its multiple implications.

158. It was concluded that draft article 7.5 should be placed between square brackets, pending its re-examination in the light of the above-mentioned concerns and suggestions. The Secretariat was requested to prepare a revised draft, with possible alternative texts to take account of the suggestions made. At the close of the discussion, the Working Group generally agreed that in revising the draft provision, due consideration should be given to the fact that the information referred to in draft article 7.5 might be communicated by way of electronic messages, i.e., fed into an electronic communication system and replicated with or without change in the transmission process.

**(f) Paragraph 7.6**

159. It was observed that draft article 7.6 held the shipper liable for damage caused by the goods (and for non-fulfilment of its obligations under article 7.1) based on fault with the burden of proof upon the shipper to show that the loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or consequences of which a diligent shipper was unable to prevent. It was recognized that draft article 7.6 reversed the approach taken in both article 4.6 of the Hague-Visby Rules and article 13 of the Hamburg Rules, where strict liability applied for damage caused by dangerous goods. It was suggested that the commentary set out in paragraph 116 of the note by the Secretariat (A/CN.9/WG.III/WP.21) did not sufficiently justify the shift from the existing law set out under draft article 7.6.

160. One delegation considered that the reference to the standard of liability being that of the "diligent shipper" was too ambiguous. It was stated in response that this represented an appropriately flexible standard, which should be understandable in all legal systems. The view was expressed that the burden of proof placed on the shipper according to draft article 7.6 was heavier than that placed on the carrier under draft article 6.1. It was observed that draft article 7.6 imposed a heavy burden of proof upon the shipper, particularly in so far as it related to proving that the loss, damage or injury caused by the goods was caused by events that could not be avoided or prevented by a diligent shipper. It was suggested that the higher standard of proof should only apply in respect of the breach of obligations under article 7.1. In response, it was stated that the stricter standard was appropriate as it sent a proper message to shippers as to the paramount importance of safety at sea.

161. Given that the carrier had the benefit of exemptions and limitations that were not available to the shipper, it was suggested that the following text should be included in draft article 7.6: "A shipper is not responsible for loss or damage sustained by a carrier or a ship from any cause without the act, fault, or neglect of the shipper, its agents, or its servants". It was suggested that such a text was intended to replace the existing text of draft article 7.6 but that it should be placed in square brackets to indicate that the question of determining upon whom the burden of proof should fall was still outstanding and would be subject to further discussions. It was also suggested that neither that proposal nor the current text of draft article 7.6 adequately addressed the situation of contributory negligence where a carrier failed to comply with its obligations under draft article 7.2 and this contributed to the shipper's failure to comply with draft article 7.6. It was generally felt that the text needed to take account of that matter.

162. Broad support was expressed in favour of the suggested language. However, several comments were made in respect of the proposed text. It was suggested that the scope of responsibility of the shipper in draft article 7.6 needed to be examined from several different situations: first, where damage was done to the vessel by the goods themselves; second, where the goods caused damage to the crew on board the vessel; and, third, where the goods damaged other goods on board the vessel. It was stated that the proposed text might assist in better dealing with those three categories of damages. It was also stated that the proposed text might be better suited to dealing with shipper responsibilities vis-à-vis third parties, which were not covered by the current text of draft article 7.6. Another comment on the proposal was that it was largely based on both the Hague Rules and article 12 of the Hamburg Rules, and that such an approach based on liability for fault represented an improved formulation on the text set out in draft article 7.6. A further comment was that the reference to "ship" in the draft proposal might need to be reconsidered in the event that the draft instrument would apply to door-to-door transport rather than merely on a port-to-port basis. In the context of door-to-door transport, the text would need to be reviewed against the background of other unimodal conventions. Yet another comment was that the reference to third parties in the proposal was too broad and given that this issue was dealt with by other regimes regarding safety such as the HNS Convention, it would be better to restrict the proposal to the shipper and carrier.

163. The view was expressed that the main difficulty arising under draft article 7.6 was that the distinction between ordinary and dangerous goods, which existed in

other maritime conventions, had been removed from the draft instrument. It was suggested that the distinction should be included in the draft instrument so that the shipper would have strict liability for damage to the vessel caused by dangerous goods. However a concern was expressed that it was important to assess the impact of including a clause with respect to dangerous goods particularly in respect of additional costs that might arise for cargo interests. There was no unanimity in the Working Group regarding the question whether to include a specific rule dealing with dangerous cargo, and this matter was left open for further consideration.

**(g) Paragraph 7.7**

164. There was general support for the text of draft article 7.7 as a useful attempt to deal with the position of the FOB seller who, although not being the shipper, was nevertheless mentioned as the shipper in the transport document. However a concern was raised as to the use of the phrase "accepts the transport document". In that respect it was suggested that acceptance should be understood as the act or manner by which the documentary shipper became a holder of the bill of lading. It was said that the phrase should also be considered in the context of a situation when a non-negotiable transport document or non-negotiable electronic record was issued. Another concern was expressed as to whether all the liabilities and responsibilities that were imposed upon the shipper should also be imposed on the FOB seller. In response to that concern, it was stated that, given that the named shipper (as the first holder of the bill of lading) acted as the shipper with all the rights of the shipper, then it was logical that it should also assume all the obligations of the shipper. It was generally accepted that this issue should be considered a matter for further consideration. It was suggested that the draft provision should be expanded to deal with the situation where no shipper was named in the transport document with a suggestion that in such cases a presumption could apply that the person delivering the cargo was the shipper. A further concern was that the provision needed to distinguish more clearly between the shipper and the shipper named in the transport document. In that context, it was suggested that further attention should be given to determining whether the liability of the "person" identified in draft article 7.7 should be joint or joint and several with that of the shipper, or whether it should be exclusive of the liability of the shipper. It was agreed that further deliberation was needed in respect of the various views, concerns and suggestions mentioned above.

**(h) Paragraph 7.8**

165. It was stated that draft article 7.8 set out a classical principle that the shipper was responsible for the acts of omissions of its subcontractors, employees or agent and that this responsibility was properly limited to acts or omissions that fell within the scope of the person's contract, employment or agency. However, strong concerns were expressed that the provision as drafted imposed too broad responsibility for the shipper in respect of the acts of omissions of persons to whom it had delegated its responsibilities. It was suggested that the provision was too burdensome when compared to similar provisions in respect of the carrier. It was also suggested that draft article 7.8 should be further refined with reference to draft article 5.2.2 which, inter alia, allowed a carrier to act on behalf of the shipper. It was noted that there was a possibility that the carrier could attribute fault on its part

to the shipper by virtue of draft article 7.8. It was agreed that this issue should be further examined.

166. It was further agreed that the proposal for alternative language made in respect of draft article 7.6 (see above, para. 161) should be further examined and that the reference to agents and servants of the shipper in the proposal might be deleted, as the matter might be dealt with in draft article 7.8.

167. A suggestion was made that the position of the shipper with respect to the activities of its subcontractors, employees or agents should be in line with the position of carriers in respect of such persons. In that respect, it was suggested that the language in draft article 7.8 should be more closely aligned with the language used in draft article 6.3.2. In opposition to that suggestion, it was said that, although the Working Group was seeking to maintain a fair balance between the shipper and the carrier, it should not necessarily use the exact same wording when describing both parties' responsibilities. In fact it was suggested that the circumstances under which a shipper should be liable for the actions of a third party pursuant to draft article 7.8 should be considered from a different angle than the circumstances under which a carrier should be liable for acts of third parties under draft article 6.3.2.

168. As a matter of drafting, it was suggested that the draft article should be examined in all languages to ensure that consistent terms were used to describe matters such as "responsibilities" or "obligations" of the shipper.

169. The Working Group agreed that draft article 7.8 was a basis on which to continue discussions whilst keeping in mind the various concerns that had been expressed as to its current wording. At the close of the discussion, it was suggested that draft article 7.8 should be narrowed so as to apply only to shipper obligations that were delegable rather than those obligations that were non-delegable.

170. It was agreed that the text in draft article 7.8 should be retained along with the proposal set out above at paragraph 161 as an alternative for the current text of draft article 7.6 so that both texts could be considered again at a future session of the Working Group.

## 4. Draft article 9 (Freight)

171. The text of draft article 9 as discussed by the Working Group was as follows:

"9.1 (a) Freight is earned upon delivery of the goods to the consignee at the time and location mentioned in article 4.1.3, unless the parties have agreed that the freight is earned, wholly or partly, at an earlier point in time.

(b) Unless otherwise agreed, no freight becomes due for any goods that are lost before the freight for those goods is earned.

"9.2 (a) Freight is payable when it is earned, unless the parties have agreed that the freight is payable, wholly or partly, at an earlier or later point in time.

(b) If subsequent to the moment at which the freight has been earned the goods are lost, damaged, or otherwise not delivered to the consignee in accordance with the provisions of the contract of carriage, freight remains payable irrespective of the cause of such loss, damage or failure in delivery.

(c) Unless otherwise agreed, payment of freight is not subject to set-off, deduction or discount on the grounds of any counterclaim that the shipper or consignee may have against the carrier, [the indebtedness or the amount of which has not yet been agreed or established].

"9.3 (a) Unless otherwise agreed, the shipper is liable to pay the freight and other charges incidental to the carriage of the goods.

(b) If the contract of carriage provides that the liability of the shipper or any other person identified in the contract particulars as the shipper will cease, wholly or partly, upon a certain event or after a certain point of time, such cessation is not valid:

(i) with respect to any liability under chapter 7 of the shipper or a person mentioned in article 7.7; or

(ii) with respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security pursuant to article 9.5 or otherwise for the payment of such amounts;

(iii) to the extent that it conflicts with the provisions of article 12.4.

"9.4 (a) If the contract particulars in a transport document or an electronic record contain the statement "freight prepaid" or a statement of a similar nature, then neither the holder nor the consignee, is liable for the payment of the freight. This provision does not apply if the holder or the consignee is also the shipper.

(b) If the contract particulars in a transport document or an electronic record contain the statement "freight collect" or a statement of similar nature, such a statement puts the consignee on notice that it may be liable for the payment of the freight.

"9.5 (a) [Notwithstanding any agreement to the contrary,] if and to the extent that under national law applicable to the contract of carriage the consignee is liable for the payments referred to below, the carrier is entitled to retain the goods until payment of

(i) freight, deadfreight, demurrage, damages for detention and all other reimbursable costs incurred by the carrier in relation to the goods,

(ii) any damages due to the carrier under the contract of carriage,

(iii) any contribution in general average due to the carrier relating to the goods has been effected, or adequate security for such payment has been provided.

(b) If the payment as referred to in paragraph (a) of this article is not, or is not fully, effected, the carrier is entitled to sell the goods (according to the procedure, if any, as provided for in the applicable national law) and to satisfy the amounts payable to it (including the costs of such recourse) from the proceeds of such sale. Any balance remaining from the proceeds of such sale shall be made available to the consignee."

**(a) Paragraph 9.1**

172. By way of general comment it was said that neither the Hague nor the Hamburg regimes contained provisions on freight and that it was questionable whether the draft instrument would benefit from dealing with this issue. If there should be provisions on freight, they should be balanced and, for example, appropriately deal with the situation where the goods were delivered in a totally damaged condition (in which case, according to the current draft, full freight was payable). However, in response it was noted that, in the case of damaged goods, the freight already paid or owed, formed part of the claim for damages. Further reservations as to the inclusion of freight provisions were based on the fact that practices varied widely between different trades, a situation that would be further complicated by the fact that the draft instrument might apply to door-to-door carriage.

173. However, wide support was expressed for the inclusion of provisions relating to freight which respected the principle of the freedom of contract, on the basis that such provisions would assist in the unification of this area of maritime law particularly in light of the fact that national legislation in a number of jurisdictions took differing approaches on the payment of freight. It was said that if the draft instrument were to apply on a door-to-door basis, then provisions relating to freight that applied in existing unimodal conventions would need to be considered.

174. The Working Group undertook a discussion as to what was meant by the term "earned upon delivery". It was said that this meant that the claim existed at the time of the delivery. It was suggested that the provision should more clearly distinguish between when a claim arose and when it was earned. Further explanation was sought as to what was meant by the term "earned" in the context of draft article 9(1). In response, it was suggested that the term "earned" referred to when a debt accrued although it may be actually payable at some later date. The view was expressed that the distinction was borne out by the fact that draft article 9(1) dealt with the question when freight was earned, whereas draft article 9(2) dealt with when freight was payable. Concerns as to the clarity of this provision were however maintained. It was also suggested that draft article 9.1 required that the carrier could not claim freight for the transport until the transportation of the goods had been carried out but that this was subject to contrary party agreement. It was suggested that whilst the time for when freight became payable should be non-mandatory, the question of whether or not the claim for freight came into existence should not be open to contractual negotiation. Overall there were differences in opinion in the Working Group as to what was meant by the terms "earned" and "due". It was agreed that further clarity be sought in any future drafts of this provision. There was general agreement that the principle of freedom of contract should apply to determining when the payment of freight was earned as well as when the payment of freight became due. As well, it was suggested that the provision should expressly state that the amount of freight should be established by agreement between the parties.

175. As to the provision that freight was earned upon delivery of the goods, it was considered that if a shipper failed to hand over goods to the carrier as agreed, the carrier should still be entitled to receive at least part of the freight. However, it was

stated in reply that freedom of contract offered sufficient flexibility to address such issues.

176. In respect of paragraph (b) of draft article 9.1, it was suggested that the provision was drafted too broadly. In this respect, it was said that simply stating that no freight was due for any goods that were lost before the freight for the goods was earned, was too broad. It was suggested that the operation of this provision needed to be clarified with reference to different causes for non-delivery, such as: when the carrier was responsible, when nobody was responsible (*force majeure*) and when the shipper was responsible.

177. It was noted that there existed rules, practices and regulations, including rules elaborated at regional levels, the example was given of COCATRAM (*Comisión Centroamericana de Transporte Marítimo*), which dealt with issues such as, the currency of freight, the effects of devaluation or appreciation of the currency, as well as the carrier's right to inspect goods and correct the amount of freight if the basis for calculating it was found to be inaccurate. It was suggested that the draft instrument should not interfere with any current or future arrangements of that nature.

**(b) Paragraph 9.2**

178. By way of analysis of the structure of paragraph 9.2, it was observed that draft article 9 established a distinction between the conditions under which the obligation to pay freight came into existence (which were dealt with in paragraph 9.1) and the circumstances under which freight became payable (which were dealt with under paragraph 9.2).

179. A concern was expressed as to the interplay and the possible inconsistency between paragraphs 9.1 (a) and 9.2 (b). Assuming that, under paragraph 9.1 (a), freight was earned upon delivery of the goods, a question was raised as to the circumstances under paragraph 9.2 (c) where, subsequent to delivery, the goods would be "lost, damaged, or otherwise not delivered". In response, it was explained that paragraph 9.2 (b) was intended to address only the situation where the freight had been stipulated payable in advance, a situation that would probably be the most commonly found in practice in view of the general inclusion of clauses on the time when freight was earned in transport documents. With a view to alleviating the above-mentioned concern, a proposal was made that draft article 9.2(b) should be redrafted along the following lines: "Where freight is earned before delivery of the goods, the loss, damage and/or non-delivery of the goods to the consignee does not render the earned freight non-payable, irrespective of the causes of such loss, damage and/or failure in delivery".

180. It was observed that, should the draft instrument govern non-maritime transport in the context of door-to-door contracts of carriage, particular attention would need to be given to the interaction and possible conflict between the maritime regime under which freight remained payable even if the goods were lost and other unimodal transport regimes such as that established by the CMR, where the carrier had an obligation to refund freight if the goods were lost.

181. More generally, the view was expressed that establishing an international regime where freight remained payable even if the goods were lost, while consistent

with a number of existing national laws, might be regarded by some as unfair and difficult to justify in a uniform international instrument. It was stated that no attempt should be made towards providing a uniform solution regarding that matter, which should be left to national laws. It was observed, however, that the policy under which freight remained payable even if the goods were lost was not unfavourable to the shipper. If the goods were lost, the amount of freight would be added to the value of the goods for the purposes of calculating compensation under draft article 6.2. If freight were included, the amount of compensation would therefore be calculated on the basis of a higher value.

182. With respect to paragraph 9.2 (c), a question was raised regarding the reasons for which the draft provision established the general prohibition of set-off as a default rule. It was stated that such a policy might run counter to the general law of obligations in certain countries. The contrary view was that the policy reflected in paragraph 9.2 (c) was satisfactory in that it insisted on the need for the parties to agree mutually on the set-off, thus preventing unilateral set-off by the shipper. That policy was said to be in line with the general principle on which draft article 9 was based that party autonomy should prevail in respect of freight. With a view to reconciling the two positions, wide support was expressed for including in the draft provision the words currently between square brackets ("the indebtedness or the amount of which has not yet been agreed or established").

183. After discussion, it was provisionally agreed that, for continuation of the discussion at a later stage, the draft provision should be restructured, with paragraphs 9.1 (a) and 9.2 (a) being combined in a single provision, paragraph 9.1 (b) standing alone and paragraphs 9.2 (b) and 9.2 (c) also being combined. It was also provisionally agreed that appropriate clarification should be introduced to limit the application of paragraph 9.2 (b) and (c) to cases where specific agreement had been concluded between the parties.

**(c) Paragraph 9.3**

184. It was noted that draft provisions 9.3 (a) provided a fall-back, non-mandatory rule in case the transport contract did not settle the question who was the debtor for the freight and other incidental charges.

185. It was observed that the draft instrument provided no explanation as to what was covered by the term "charges incidental to the carriage of the goods" and that the term might be understood as covering a rather broad category of claims that might include, for instance, demurrage (damages for detaining the ship beyond the time contractually allowed for operations such as loading or unloading), other damages for detention, general average contributions and other reimbursable costs incurred by the carrier. It was considered in reply that the charges, being limited to those "incidental to the carriage of the goods", would cover only those that the carrier was justified to claim from the shipper; for example, where the shipper had the free use of the carrier's container but it would use the container beyond the agreed period, the shipper would be liable for the cost of using the container beyond the period of free use. The carrier might also have to incur costs in relation to the goods when, for example, they were refused entry by the customs authority and the carrier had costs therewith; it was suggested, however, that such costs more properly fell within draft provision 7.6, in particular in its proposed revised version

(see above, para. 161). The Working Group took note of those statements and did not take any decision as to whether further clarification of the term was needed.

186. As to draft provision 9.3 (b), it was noted that it addressed situations, relevant in particular to trade under charter parties (which were not to be covered by the draft instrument), where the charterer, having paid part of the freight in advance or having transferred to a shipper the right to have goods carried, wished to be relieved of any other obligations relating to the carriage. In such a situation the parties would include in the charter party a clause (in practice often referred to as a "cesser clause") to the effect that the charterer's liability for freight would cease on shipment of the cargo; that meant that the carrier was to claim freight from the cargo owner or shipper and could for that purpose rely on the security interest (or lien) in the cargo.

187. As to the relevance of draft article 9.3 (b) to transport contracts governed by the draft instrument, it was noted that, normally, the shipper's liability would not cease upon events such as the shipment of the cargo or the transfer of the bill of lading (and, to that extent, the draft provision was not needed). However, should the parties include in the transport contract governed by the draft instrument a clause with the effect of a cesser clause (which it was recognized would not be frequent in practice) or should a cesser clause become part of the bill of lading because the terms and conditions in the charter party would be incorporated in it by reference (and the cesser clause would indeed operate to terminate the shipper's liability for freight and other incidental claims, which was not necessarily the case because of the way such incorporated cesser clauses were interpreted by courts), draft provision 9.3 (b) would ensure that the shipper would remain bound to the carrier as specified in subparagraphs (i), (ii) and (iii). It was noted that the draft provision was mandatory, i.e. that it overrode the agreement of the parties.

188. Some support was expressed for the draft provision, since it ensured that the carrier's claim for freight was not left unpaid. However, considerable opposition and criticism were voiced against it. It was said to be unjustified that the provision was mandatory in an area where there was no need to protect a weaker party and, more generally, where freedom of contract should not be restricted, since the parties might have valid reasons to regulate by contract how the obligations of the shipper were to be dealt with. It was also said that the provision was too broadly worded in that subparagraph (b)(ii) covered "any amounts" payable to the carrier, irrespective of the extent to which a cesser clause had freed the shipper from its payment obligation. Moreover, by referring to any liability under chapter 7 (which covered a broad array of obligations of the shipper beyond the payment of freight), the provision was out of place in draft article 9 on freight. It was also said that it should be carefully studied whether the mandatory provision should extend to all those obligations.

189. The Working Group took note of the criticism of provision 9.3 (b) and decided to postpone its decision on the matter until the issue, including the practical context in which the provision was to operate, was further studied.

190. Due to the absence of sufficient time, the Working Group did not complete its reading of draft article 9. It was agreed that the remaining paragraphs of draft article 9 and the remainder of the provisions of the draft instrument would be considered by the Working Group at its tenth session.